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No. 91-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, David H. Lucas, and the Respondent, the South Carolina Coastal Council. Briefs were filed *amicus curiae* by the NCNB Bank of South Carolina, the Sierra Club and South Carolina Wildlife Federation, and by the Pacific Legal Foundation.

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR WRIT OF CERTIORARI

The Petitioner David H. Lucas respectfully prays that a writ of certiorari issue to review the February 11, 1991, judgment and opinion of the South Carolina Supreme Court, and the June 17, 1991, denial of his Petition for Rehearing in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court dated February 11, 1991, including the dissenting opinion of Justice Harwell (concurred in by Justice Chandler), is reported at 404 S.E.2d 895 (S.C.

1991), and is reprinted in the appendix hereto, at App. 1, infra.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated June 17, 1991, has not yet been reported, and is reprinted in the appendix, at App. 32, infra.

The opinion and judgment of the Circuit Court of Charleston County, Special Judge Patterson presiding, of August 10, 1988, was not reported, and is reprinted in the appendix, at App. 33, infra.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the South Carolina Supreme Court of February 11, 1991. Petitioner's subsequent Petition for Rehearing was denied on June 17, 1991. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The South Carolina Beachfront Management Act, 1988 Act No. 634, S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), as amended by 1990 Act No. 607, is set forth in the appendix, at App. 42, infra.

STATEMENT OF THE CASE

In December 1986, the Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina. He paid $975,000 for both pieces of property, which were zoned single-family residential. Lucas intended to build a house on each property, one for his own family and one for resale.

On July 1, 1988, South Carolina's Beachfront Management Act, S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), came into force. Under the Act, the South Carolina Coastal Council, the Respondent in this Petition, was obliged to draw baselines and setback lines along the South Carolina coast. The Council drew a setback line behind Lucas's properties, thus precluding him from building habitable or permanent structures thereupon.

After the passage of the Act, Lucas filed an action in the Circuit Court of Charleston County, claiming that the Act so restricted his ownership rights that it amounted to a taking of his property without just compensation in violation of both the South Carolina and United States Constitutions. (See Complaint, ¶5; reprinted in Appendix, App. 153, infra.) The Circuit Court, Patterson, J., presiding, found that the Act had worked a permanent and total loss in the value of Lucas's property, and it awarded $1,232,387.50 in compensation. The South Carolina Coastal Council appealed. The South Carolina Supreme Court reversed, holding (on February 11, 1991)

that the Act did not work a taking requiring compensation under either the state or federal constitutions. The South Carolina Supreme Court's decision on the merits of Petitioner's federal constitutional claims appears at *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895, 898-902 (1991).

On June 17, 1991, the South Carolina Supreme Court rejected Lucas's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

THE SOUTH CAROLINA SUPREME COURT FAILED TO PROPERLY WEIGH PRIVATE AND PUBLIC INTERESTS WHEN IT APPROVED A REGULATORY TAKING WITHOUT COMPENSATION

This Petition invites the Court to revisit the nettlesome field of regulatory takings law. The South Carolina Supreme Court has repudiated the recent jurisprudence of this Court by converting an admittedly complex inquiry into a bright-line test which ignores private interests in property affected by state regulation. In holding that the South Carolina Beachfront Management Act (the "Act"), S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), does not effect a regulatory taking of Petitioner's coastal property, the South Carolina Supreme Court ruled that the state need only prove that it is acting pursuant to its legitimate police powers in order to evade the constitutional duty of just compensation. This ruling is contrary to the recent holdings of this Court and is utterly subversive of takings jurisprudence.

As will be apparent upon reading the South Carolina Supreme Court's decision in this matter, the relevant case law on this subject embraces a recent utterance of this Court on the subject, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), as well as earlier opinions bearing on the question whether states have a duty to provide just compensation when regulations have the effect of all but eliminating the value of private property. This Petition does not concern the exercise of eminent domain. Petitioner concedes that no permanent physical occupation occurred here.[1] Nor does this Petition touch upon the quantum or modalities of "just compensation." Finally, this Petition does not seek to challenge the public wisdom of the South Carolina Act. The South Carolina Supreme Court chose to view Petitioner's position on this last issue as conceding not only the proper exercise of the state's police power for land-use regulation, but also as an admission that Petitioner's intended use of his land amounted to a nuisance. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E. 2d 895, 898, 900 (1991). But not all exercises of a state's police power are directed

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[1] The recently-filed Petition for Writ of Certiorari in *Beard v. South Carolina Coastal Council*, No. 91-137 (U.S. filed July 26, 1991), chiefly raises a claim of a public easement imposed with the refusal to grant that claimant the right to build a beach bulkhead which could exclude the public. As in the *Ludas* case, however, the South Carolina Supreme Court held the Beards's concession that coastal protection was a legitimate state interest to be an admission that "regulation of property is necessary to protect against serious public harm. . . . thereby prohibiting the finding that the property has been 'taken'." *Beard v. South Carolina Coastal Council*, ___ S.C. ___, ___, 403 S.E.2d 620, 622 (1991).

against nuisances, and the Petitioner maintains that his desire to build private residences on beachfront property is not a nuisance that would legitimize a state regulation having the effect of depriving him of virtually all use in his property, without just compensation.

The proposition that a state's land-use regulation intended to prevent a public nuisance is immune from just compensation originates from this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887). The South Carolina Supreme Court seized upon this exception, enunciated in *Mugler*, to hold that the Act's limitation on the Petitioner's building on his property did not require compensation by the state. *Lucas*. ___ S.C. at ___, 404 S.E.2d at 900. Had the evolution of takings jurisprudence ended in 1887, then the South Carolina Supreme Court's analysis (which utterly ignored the Petitioner's expectation interests in the property) might be justified. *Cf. Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (listing among relevant factors in regulatory takings cases, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . "). The truth is, however, that this Court has held that land-use regulation may effect a taking if it does not "substantially advance legitimate state interests" *or* "denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). Once again, Petitioner did not dispute that South Carolina's coastal protection legislation substantially advanced legitimate state interests. The question that Petitioner expected would be resolved by the South Carolina

Supreme Court was whether the regulation so diminished his ownership interests in the coastal property as to constitute a taking requiring compensation under the Fifth Amendment.

Instead, it appears that the South Carolina Supreme Court misconstrued *Keystone Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), to read that a mere finding of a legitimate use of police power makes the regulation directed against a nuisance, and thus immune from compensation, even if the effect of the regulation is to make the property all but worthless. This reading of *Keystone* is flawed for two separate and distinct reasons. First, the South Carolina Supreme Court has assumed that *Keystone* in effect overturned *Agins* and *Nollan* to the extent that they require the public weal in regulation to be weighed against private expectation interests in the property being regulated. The South Carolina Supreme Court's decision on this point jettisons the venerable jurisprudence of Justice Holmes, writing for the majority of the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Keystone's cryptic treatment of this issue has resulted in a split in decisions among the federal Courts of Appeal. The crux of the disagreement is whether all the state must show is a legitimate exercise of police power in order to evade a duty to compensate under the Fifth Amendment. The Court of Appeals for the Fourth Circuit, in a case also concerning the South Carolina Beachfront Management Act, has held that this is simply not enough to satisfy the Constitution. *See Esposito v. South Carolina Coastal Council*, slip op. at 7-10, 1991 U.S. App. Lexis

15106, 1991 Westlaw 117991 (4th Cir. July 3, 1991) (reprinted in appendix, at App. 158, infra). This case concerned two claimants' challenges. The Fourth Circuit Court of Appeals ruled in one case that claimant Esposito had failed to prove that the Act had worked to substantially deny the economically viable use of his land.[2] Implicit in this holding is that *Keystone* still demands that courts balance private and public interests, notwithstanding a finding that the regulation was a valid exercise of police power.

Some federal Courts of Appeal have made this explicit. *See McDougal v. County of Imperial*, slip op. at 12-20, 1991 U.S. App. Lexis 19177, 1991 Westlaw 156897 (9th Cir. Aug. 20, 1991) ("We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use

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[2] *Esposito* is otherwise legally and factually inapposite to Mr. Lucas's case. Mr. Esposito's claim was resolved by the Fourth Circuit by a finding that any diminution in the value of his property, attributable to the Act, was speculative because the Act would only prevent the *re*building of a structure on the land, and not compel any demolition. Mr. Chavous's claim, like Petitioner's, involved the effect of the Act in barring any construction of a structure where none had existed previously. The Fourth Circuit ruled that this claim had been mooted by subsequent changes in the Beachfront Management Act, 1990 Act No. 607, S.C. Code Ann. § 48-39-290(D) (1990 Cum. Supp.). *See Esposito*, slip op. at 6, 10-11. The South Carolina Supreme Court did not consider the effect of any such superseding legislation in Mr. Lucas's case. Of these three claims, only Mr. Lucas's, the Petitioner here, squarely raises the issue of a non-speculative loss of the use of his property.

of his property."); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits the total destruction of property rights without compensation."); *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990) ("We favor the . . . position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation."). To the contrary is a ruling of the Court of Appeals for the Third Circuit in *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 915 (3d Cir. 1987). This schism in interpreting *Keystone* is likely to grow,[3] despite the fact that the *Keystone* court could not have passed on the question of whether something more than a showing of legitimate police powers is needed to validate a regulatory taking without compensation. After all, *Keystone* involved a facial challenge to a regulation under the Fifth Amendment; no evidence was even proferred concerning economic impact. *See Keystone*, 480 U.S. at 478. *Keystone* does not apply to cases where claimants are seeking more

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[3] State supreme courts have likewise held that, *Keystone* notwithstanding, a regulation directed against a nuisance can still work a taking if it results in a substantial diminution in the value of property. *See Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied*, 110 S.Ct. 1130 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted).

than injunctive relief, and where a concrete controversy exists concerning the effect of a regulation on a specific parcel of land.

The South Carolina Supreme Court was, nonetheless, express in its ruling on this point: it made no difference *how much* the Petitioner's ownership interest was affected by the regulation. The critical defect of that decision – and the primary reason that review is merited here – is the failure to weigh both private and public interests in the takings calculus, and, instead, relying upon a characterization of the police power implicated in the regulation.

The South Carolina Supreme Court's second misapprehension of *Keystone* goes precisely to that act of characterization and the consequent confusion between legitimate police powers and land-use regulations directed against nuisances. In fairness to the South Carolina Supreme Court, its misstep can be traced to unfortunate language in *Keystone*. In that opinion, a majority of the Court chose not to make the distinction between police powers and nuisances. In declining to grasp the nettle, this Court did *not* question the principle that legitimate land-use regulations under police powers need not be invariably directed against nuisances. Instead, the Court seemed to decide only that the distinction was not important in the case at hand. *Keystone*, 480 U.S. at 490-92. Dissenting opinions in both *Keystone* and *Penn Central Transp. Co.* have attempted to maintain the distinction even in the face of majority opinions which have chosen not to utilize it. *See Keystone*, 480 U.S. at 512-15 (Rehnquist, C.J., dissenting; joined by Powell, O'Connor, Scalia, JJ); *Penn Central Transp. Co.*, 438 U.S. at 145 (Rehnquist, J., dissenting; joined by Burger, C.J. and Stevens, J.) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself").[4]

The necessity of this distinction is graphically illustrated in this case. Once again, Petitioner did not question that the Beachfront Management Act was a valid exercise of South Carolina's police power and was a valid land-use regulation. To have raised such a challenge would have been futile and silly. But the question of legitimate land-use regulation is rather different from the inquiry whether the activity being regulated constitutes a nuisance so as to come within that categorical exception to the taking guarantee.

This second inquiry focuses on the nexus between the individual property owner's intended use of the land and the state interests raised. Although within the domain of takings jurisprudence, this inquiry has many

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[4] Lower federal courts have continued to interpret *Keystone* as requiring a distinction to be drawn between regulations supported by legitimate public policy, and those specifically directed against public nuisances. *See Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161, 166-68 (1990).

A number of state supreme courts have likewise held. *See Western Energy Co. v. Genie Land Co.*, ___ Mont. ___, ___, 737 P.2d 478, 482 (1987) ("The [U.S. Supreme] Court has never allowed the nuisance exception to allow complete extinction of a parcel of property.") (paraphrasing *Keystone*, 480 U.S. at 470, (Rehnquist, C.J., dissenting)); *Orion Corp. v. State*, 109 Wash.2d 621, 650-51, 747 P.2d 1062, 1078 (1987) ("We [have] held that [a] challenged regulation could not effect an eminent domain taking, unless the nature of the encumberance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land."), *cert. denied*, 486 U.S. 1022 (1988).

qualities of substantive due process analysis. *See Hadacheck v. Sebastian*, 239 U.S. 394, 407 (1915); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). However this analysis is denominated – and whatever its standard – it is manifest that the South Carolina Supreme Court chose not to make this inquiry, and, instead, rested squarely on the Petitioner's reasoned and intelligent concession that the Act was merely a legitimate exercise of State regulation.

It is obviously not the place of this Court to substitute its judgment for that of the South Carolina Supreme Court for the two determinations it was required to make under the Fifth Amendment to the Constitution: (1) was the effect of the Act to regulate, in the Petitioner's case, an activity constituting a nuisance?, and (2), even so, was the Petitioner's ownership interest in property so substantially diminished as to result in a regulatory taking requiring compensation? The significant fact is that the South Carolina Supreme Court failed to decide these issues, and, instead, relied on a categorical rule of construction that is erroneous in law and utterly subversive of the Fifth Amendment guarantee against public takings without just compensation.

If this Petition is granted, this Court can pass upon the continued vitality of the nuisance exception to the takings guarantee. The Court may choose to abandon the exception altogether. Or it may prefer to limit its scope to occasions where the land-use regulation is specifically directed against a public nuisance, and is not just an exercise of a State's legitimate police power. Finally, the Court may wish to affirm some form of the nuisance exception, but with the proviso that in cases where the value of the property affected is so substantially reduced

as to frustrate pre-existing investment-backed expectations, then compensation is still due under the Fifth Amendment. Although Petitioner intends to vigorously argue each of these positions to the Court, he is, of course, indifferent as to which might be selected. The result would still be the same: a remand of the case to the South Carolina Supreme Court for a more searching – and constitutionally defensible – determination of Petitioner's rights and interests in his property.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioner to file his brief and to articulate more comprehensively why the South Carolina Supreme Court failed to properly weigh private and public interests when it approved this regulatory taking without compensation. If the South Carolina Supreme Court's decision goes unreviewed it will mean that a mere showing of legitimate exercises of police power in land-use regulation, without any concomitant balancing of private interests, will suffice in denying just compensation for takings under the Fifth Amendment to the United States Constitution.

Respectfully submitted,

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September 13, 1991

APPENDIX A

David H. LUCAS, Respondent.

v.

SOUTH CAROLINA COASTAL COUNCIL, Appellant,

No. 23342.

Supreme Court of South Carolina.

Heard April 2, 1990.

Decided Feb. 11, 1991.

C.C. Harness, III, of S.C. Coastal Council, Charleston, for appellant.

Gedney M. Howe, III; and Ellison D. Smith, IV, of Smith & Bundy, Charleston, for respondent. Samuel H. Altman, of Altman & Sturgis, P.A., Charleston, amicus curiae, for NCNB Bank of South Carolina, James S. Chandler, Jr., Pawleys Island, amicus curiae, for Sierra Club and S.C. Wildlife Federation, Steven M. Rudisill, Rock Hill; and Ronald A. Zumbruy, Edward J. Connor, Jr., and Timothy V. Kassouni, of Pacific Legal Foundation, Sacramento, Cal., amicus curiae, for Pacific Legal Foundation.

TOAL, Justice:

This appeal concerns whether the enforcement and application of the 1988 Beachfront Management Act to the plaintiff-respondent's property is a taking of such property without just compensation.

FACTS

David H. Lucas, the respondent, owns two vacant oceanfront lots in the Beachwood East Subdivision of the Wild Dunes development on the Isle of Palms in Charleston County, South Carolina. The Beachfront Management Act, S.C.Code Ann. § 48-39-10 *et seq.* (1989 Cum.Supp.) (hereinafter referred to as "Act") limits construction within the beach/dune system in a critical area, as defined by the Act. As applied to the two Lucas lots, the Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a small deck or walkway.

Lucas instituted an action in the Court of Common Pleas, asserting that the restrictions on the use of his lots worked a taking of his property without just compensation. The lower court agreed and awarded Lucas $1,232,387.50 as just compensation for the "regulatory" taking. The South Carolina Coastal Council, the administrator of the Beachfront Management Act, now appeals. We reverse.

LAW/ANALYSIS

Although the regulatory takings questions is a complex one, and although regulations affecting coastal property are especially problematic,[1] this appeal presents, in

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[1] For example, theories such as dedication, prescription, custom, purpresture, and the public trust doctrine can be resorted to by the public in an attempt to regulate private property immediately adjacent to the public property which

(Continued on following page)

the end, what in our view is a relatively straightforward issue. The issue is whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a "regulatory taking" of property for which compensation must be paid. Lucas' position, which is dealt with more extensively below, is that if he is deprived of "all economically viable use" of his property, he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm. Coastal Council's view, obviously, is that no compensation is due a landowner whose private use threatens serious public harm. We choose to characterize this issue as "straightforward" because, in the final analysis, Lucas' position and the position of our dissenting brothers, is the position of the dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), while the Council, 281 S.C. 201, 314 S.E.2d 327 (1984). We choose not to overrule *Carter*, and we choose to follow the majority view rather than the dissent in *Keystone*.

(Continued from previous page)

sits below the mean highwater mark. *See generally* Finnell, *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C.L. Rev. 627 (1989). We express no opinion concerning the force and validity of those theories in particular circumstances. We also express no opinion on the validity of portions of the Act to certain lands in light of our rule that, when a landowner causes his land to accrete through artificial means, he does not become the owner under the doctrine of title by accretion. *See Epps v. Freeman*, 261 S.C. 375, 200 S.E.2d 235 (1973).

Lucas concedes that the Beachfront Management Act is properly and validly designed to preserve the extremely valuable resource which is South Carolina's beaches. He concedes that the preservation of this existing public resource from harm is a "laudable goal." *See* Respondent's Brief, at p. 4. He admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its "findings" and "policy" embodied in Sections 1 and 2 of 1988 Act No. 634.[2] This Court is therefore in no position to question the legislative scheme or purpose. Section 1 of the Act reads:

SECTION 1. The General Assembly finds that:

(1) *The beach/dune system along the coast of South Carolina is extremely important to the people of this State* and serves the following functions:

(a) *protects life and property by serving as a storm barrier* which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) *provides the basis for a tourism industry* that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of

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[2] It appears that Sections 1 and 2 of the 1988 Act were intended to be labeled as amendments to S.C.Code Ann. §§ 48-39-20 (1987) (entitled "Legislative declaration of findings") and 48-39-30 (1987) (entitled "Legislative declaration of state policy"), although they are not designated as such in the actual codification. *See* Editor's Note to § 48-39-270. The sections have, during the pendency of this case, been incorporated into the codification as Sections 48-39-250 and 48-39-260. Concomitantly, sections 1 and 2 of the 1988 Act have, as such, been repealed. *See* Act 607, 1990 S.C. Acts 2581.

the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) *provides habitat for numerous species of plants and animals, several of which are threatened or endangered*. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

(d) *provides a natural health environment for the citizens of South Carolina* to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) *Many miles of South Carolina's beaches have been identified as critically eroding.*

(4) Chapter 39, Title 48, Code of Laws of South Carolina, 1976, Coastal Tidelands and Wetlands, does not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development has been unwisely sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not

proven effective. These armoring devices have given a false sense of security to beach front property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) *Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.*

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the long shore transport of sand, can deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also can deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and effectively manage the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

(Emphasis added).

Section 2 of the Act reads:

SECTION 2. In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a public area which serves as a major source of state and local revenue;

(c) habitat for indigenous flora and fauna;

(d) a place which harbors natural beauty;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beach front to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. This Court is likewise bound by these uncontested legislative findings. In lieu of any attack whatsoever on

the statutory scheme, Lucas rests on a solitary argument, *viz.*, that he is still, despite these concessions, entitled to compensation from the State. He contends that a single legal test exists which, if failed, conclusively establishes that a "regulatory taking" has occurred. Lucas maintains that if a regulation operates to deprive a landowner of "all economically viable use" of his property, it has worked a "taking" for which compensation is due, regardless of any other consideration. This is simply an erroneous statement of existing law.

At the outset, we recently noted that "[t]he United States Supreme Court has never articulated a 'set formula' to determine where regulation ends and taking begins." *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455, 457 n. 2 (1990). As a result, "takings" cases have been decided by the Supreme Court on a case-by-case basis, with the Court considering a variety of factors depending upon the circumstances before them. Among the factors considered are: (1) the economic impact of the regulation; (2) the regulation's interference with investment backed expectations; (3) the character of the government action (whether there is a physical invasion); and (4) the nature of the State's interest in the regulation. *See Keystone, supra*, 107 S.Ct. at 1244, 1247.

One or more but fewer than all of these factors may be critical and determinative in a given case. A clear example of this is the fact that the United States Supreme Court has almost invariably found a taking when the government regulation is characterized as a permanent physical occupation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438, 102 S.Ct. 3164, 3175-3177, 73 L.Ed.2d 868 (1982).

A second clear example is in the fact that a taking has not been found when the regulation exists to prevent serious public harm. *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition on the manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting the manufacture of bricks near residents in Los Angeles); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards); and *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition against excavating below the water table in order to extract gravel).

The Supreme Court has noted that the "special status" of this kind of regulation can be understood by way of "the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone, supra*, 107 S.Ct. at 1245 n. 20. In conjunction with this analysis, the Supreme Court has stated it "is hard to imagine a different rule that would be consistent with the maxim *'Sic utere tuo ut alienum non laedas'* [use your own property in such manner as not to injure that of another]." (Brackets in the original). *Id.*, 107 S.Ct. at 1246 n. 22.

This Court has repeatedly used this same analysis in determining regulatory takings questions. Finding that the regulation under attack prevented a use seriously harming the public, we have concluded that no regulatory taking has occurred. *See, e.g., Carter v. South Carolina*

Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984) (regulating the use and alteration of wetlands); *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943) (regulating the sale of intoxicating liquors); and *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955) (mandating the repair, alteration, or closing of dwellings unfit for habitation in order to protect public health and welfare).

In some of our opinions, we have indicated that no compensation is ever due a landowner when the State acts pursuant to its police power. *See, e.g., Brabham v. City of Sumter*, 275 S.C. 597, 274 S.E.2d 297 (1981) and *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956). This is perhaps too mechanical. In at least one case, the United States Supreme Court found a regulatory taking despite the fact that the State was acting pursuant to its police powers. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Loretto*, a New York law required landlords to permit cable television companies to install cable facilities on their rental property. The law was validly within the New York police powers as authorizing "rapid development of and maximum penetration by a means of communication which has important educational and community aspects." *Id.*, 102 S.Ct. at 3170. Despite this regulation for the public good, the Supreme Court found a taking since there was a physical occupation of the landowner's property.

Hence, merely because the State acts within its police powers does not end the inquiry. Nevertheless, the fact remains that the Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public *harm*, there is no "taking" for which

compensation is due. *See Mugler, Hadacheck, Miller,* and *Goldblatt, supra*. It is therefore the *way* the police power is exercised that is of critical import. Were we to adopt Lucas' argument, whether the State acts pursuant to its police power would be *wholly* irrelevant.

As mentioned earlier, Lucas fails to attack in any way the legislature's "findings" that new construction would cause serious public harm. This amounts to a concession that the *Mugler* "nuisance-like exception" applies. This Court is in no position to *sua sponte*, take issue with these legislative findings. Instead, we are constrained to base our ruling only upon Lucas' contention that a taking of property occurs when he is deprived, by operation of the regulation, of "all economically viable use" of his property. Lucas advances this proposition because of the United States Supreme Court's use of the "all economically viable use" test in certain regulatory taking cases. *See Keystone*, 107 S.Ct. at 1247 (*citing Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)).[3] It is clear, however, that such is not the dispositive test in *all* cases. Lucas' position is clearly erroneous in light of the fact that the *Keystone* majority squarely rejected the identical contention in 1987.

In the *Keystone* case, the United States Supreme Court dealt with a takings challenge by coal companies to the

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[3] If Lucas can demonstrate a deprival of all economically viable use of his land, there is no need to weigh factors such as the economic impact of the regulation and/or the regulation's interference with investment backed expectations. Such a showing by Lucas would by necessity weigh these factors in his favor.

Pennsylvania Subsidence Act, which required that fifty percent of the coal beneath certain structures be kept in place to provide surface support. In relating the history of the present takings analysis, the Court first cited *Mugler v. Kansas*, 123 U.S. 623, 668, 8 S.Ct. 273, 300, 31 L.Ed.2d 205 (1887) and its progeny for the proposition that, "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking . . . " *Keystone, supra*, 107 S.Ct. at 1244.

Twenty-five years after *Mugler*, the Supreme Court decided the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There, Justice Holmes wrote,

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413, 43 S.Ct. at 159. *Pennsylvania Coal* is relied upon by Lucas for his asserted proposition that in *all* cases, when *all* economically viable use is extinguished by regulation, compensation is due. This exact contention was

presented to the *Keystone* Court, which rejected such a rule.

The *Keystone* Court explained:

> We reject petitioner's implicit assertion that *Pennsylvania Coal* overruled [*Mugler* and its progeny] *which focused so heavily on the nature of the state's interest* in the regulation. Just five years after the *Pennsylvania Coal* decision, Justice Holmes joined the Court's unanimous decision in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), holding that the takings clause did not require the State of Virginia to compensate the owner of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. . . . [I]t was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation.

(Emphasis added) 480 U.S. at 490, 491, 107 S.Ct. at 1244, 1245. In *Keystone*, the Supreme Court again approved the *Mugler* rule that, in some cases, no compensation is due regardless of the remaining worth of the property after regulation. Specifically, the *Keystone* Court noted that "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' " 480 U.S. at 491-92, 107 S.Ct. at 1245 (*quoting Mugler v. Kansas*, 123 U.S. at 665, 8 S.Ct. at 299).[4]

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[4] We note only to prevent possible confusion that the *Keystone* majority proceeded, after reaffirming the *Mugler* rule,

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Once again, we note that Lucas does not challenge the fact that the legislation here is necessary to prevent serious injury to the community, nor does he contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms. In fact, Lucas does not even seek an injunction to prevent enforcement of the Act. Instead, Lucas merely prays for damages and asserts that he is entitle to such, regardless of how the proposed use of his property harms the public, because all economically viable use of his land has been extinguished. Lucas' argument tracks the position of Justice Rehnquist's dissent in *Keystone*.[5] We follow the *Keystone* majority and also reject this contention.

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to analyze the taking issue before them by looking at whether the Pennsylvania Subsidence Act deprived the owner of all economically viable use of their lands. However, it is clear that the Court did not engage in this latter analysis for reasons of necessity, but instead did so because the plaintiff also failed to show adequate deprival of viable economic use. The Court stated, after declaring the validity of the *Mugler* rule, "[n]onetheless, we *need not* rest our decision on this factor alone (meaning the *Mugler* rule), because petitioners have *also* failed to make a showing of [sufficient] diminution of value. . . . " *Id.*, 480 U.S. at 492-93, 107 S.Ct. at 1246.

[5] The *Keystone* dissent labels the *Mugler* line of cases the "nuisance *exception*", but then states that in no case has the Court "accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." 480 U.S. at 513, 107 S.Ct. at 1257 (Rehnquist J. dissenting). Lucas' argument is clearly simply a rephrasing of this same position.

Our decision in *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) is perhaps the best South Carolina representative of the *Keystone* majority analysis in action. In *Carter* we held that "the state may properly regulate the use of property where uncontrolled use would be harmful to the public interest; and this regulation, even though it prohibits a beneficial use, will not necessarily be deemed a taking in the constitutional sense." *Id.*, 281 S.C. at 204, 314 S.E.2d at 329. There, we upheld the validity of the 1977 Coast Zone Management Act, which prevented the uncontrolled use of coastal wetlands, since such use had a detrimental effect upon "the public welfare." *Id.* Our analysis in *Carter* did not contain a discussion of whether any "economically viable use" remained in the property of the landowners after regulation. It is clear, however, that the plaintiffs in *Carter* were as much deprived of all economically viable use of their lands as Lucas is. To adopt Lucas' argument would therefore be to overrule *Carter*. We choose not to do so.

Carter is an example of an appropriate application of the *Mugler* rule regarding regulation designed to prevent a serious public harm.[6] The application of the *Mugler* rule to appropriate regulatory takings questions has been validated in the recent *Keystone* decision.[7] The *Mugler* rule

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[6] The *Carter* decision relies in part on *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), which is one of *Mugler's* progeny.

[7] During the pendency of this case, two other courts have interpreted *Keystone* in exactly the way we have. In *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D.Fla.1989), a Florida District Court rejected a landowner's contention that a town

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may therefore be applied again under the appropriate set of facts. Lucas' *de facto* concession of the validity of the legislative scheme and of its purposes makes the instant set of facts appropriate for the application of the *Mugler* rule. We need not address the remaining issues in this case, and we express no opinion regarding them.[8] Accordingly, we REVERSE the decision of the lower court.

GREGORY, C.J., and FINNEY, J., concur.

HARWELL and CHANDLER, JJ., dissent in separate opinion.

HARWELL, Justice, dissenting:

I respectfully dissent. For the reasons discussed below, I would affirm the circuit court order which determines that application of the Beachfront Management Act

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ordinance imposing setback requirements on oceanfront property worked a "taking". The *McNulty* Court held, in pertinent part, "the government can destroy [by regulation] all economic use if necessary to avoid a public nuisance or nuisance like use." 727 F.Supp. at 609. In *Presbytery v. King County*, 114 Wash.2d 320, 787 P.2d 907 (1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990) a county ordinance prohibited all construction on several wetlands lots of the plaintiff-landowner. The *Presbytery* Court observed that if a regulation protects the public from harm, and does not infringe upon the right of the landowner to possess, exclude others, and dispose of the property, no "taking" has occurred.

[8] We also do not address the issue, not raised in this case, of whether Lucas may build a habitable structure or other structures under the provisions and procedures of the 1990 amendments to the Beachfront Management Act. *See* Act 607, 1990 S.C. Acts 2581.

under these facts does constitute a taking, and hold that the Coastal Council must either compensate Lucas in the amount set forth in the order of the circuit court or issue a permit for the construction of habitable structures on his property pursuant to the 1990 amendments to the Beachfront Management Act.[1]

DISCUSSION

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The South Carolina Constitution provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. Const. Art I § 13. Takings cases are generally recognized as falling into one of two categories: those pursuant to an exercise of eminent domain and those pursuant to an exercise of the police power. Eminent domain involves the taking of property for public use for which compensation is required to be made; police power involves regulation of private property to prevent its use in a manner detrimental to the public interest and will not necessarily result in a taking in the constitutional sense. *Carter v.*

[1] Although certain amendments to the Beachfront Management Act had not been enacted at the time this case was adjudicated, I note that neither the majority opinion nor the dissent prohibit Lucas from pursuing a course of action under the 1990 amendments which would enable him to construct a new habitable structure within the guidelines set forth in the amendments. *See*, S.C.Code Ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990).

South Carolina Coastal Council, 281 S.C. 201, 204, 314 S.E.2d 327, 329 (1984). A governmental taking of property may, however, be accomplished without the formal apparatus of eminent domain; a taking may result from a government regulation in a particular area. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250, 265 (1987).

The question of when regulation pursuant to a police power becomes a taking is not easily answered. Despite the wealth of authority on the subject of regulatory takings, this is an area of considerable confusion. Indeed, as Justice Stevens recognized in his dissent in *First English Evangelical*, the regulatory takings decisions of the United States Supreme Court have been "open-ended and standardless." 482 U.S. at 340, 107 S.Ct. at 2378, 90 L.Ed.2d at 280 (footnote 17). As one commentator noted, the "[r]egulatory taking doctrine is the most perplexing area of American land use law."[2] This case necessitates explication of the pertinent decisions in this area and reflects my interpretations of regulatory takings law.

The starting point for this discussion with the 1887 case of *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed.

[2] Settle, *Regulatory Taking Doctrine in Washington, Now You See It, Now You Don't*, 12 U.Puget Sound L.Rev. 339 (1989). The lack of uniformity in this area has been noted by other commentators. *See, e.g.* C. Harr, Land Use Planning (3d ed. 1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L.Rev. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165 (1967); Rose, *Mahon Reconstructed: Why the Takings Clause is Still a Muddle*, 57 S.Cal.L.Rev. 56 (1984).

205 (1887) in which the Supreme Court recognized that "government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." *Penn Central Transportation Company v. New York*, 438 U.S. 104, 144, 98 S.Ct. 2646, 2669, 57 L.Ed.2d 631, 661 (1978). At issue in *Mugler* was a statute prohibiting use of a distillery for the manufacture of intoxicating liquors. The Supreme Court upheld the statute and reasoned that the power of the State to prohibit uses of property "prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain." *Mugler v. Kansas*, 123 U.S. at 669, 8 S.Ct. at 301, 31 L.Ed. at 213.

Mugler stands for the proposition that where the legislature has deemed an act to be necessary for the public's health, safety, and welfare, the judiciary need not scrutinize the acts of the legislature regardless of the extent of loss suffered by the property owner. A prohibition on the use of property, enacted in the interest of the community as a whole, the *Mugler* court held, cannot be deemed a taking or appropriation.

For the same reasons as those articulated in *Mugler*, the Supreme Court has held other state action not to constitute a compensable taking when necessary to prevent property owners from using such property in a manner which I perceive to be best described as nuisance oriented. *See, e.g. Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (statute disallowing operation of a brickyard in a residential area); *Reinman v. City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915)

(law disallowing operation of livery stable in downtown area); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute ordering destruction of red cedar trees because they produced cedar rust fatal to apple trees, an important state crop).

The viability of the *Mugler* analysis was first questioned in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Instead of following the *Mugler* approach of deferring to the judgment of the legislature with respect to the regulation at issue in *Pennsylvania Coal*, the Supreme Court instead evaluated the subject regulation and determined that the public interest it protected was not sufficient to warrant an exercise of police power. Justice Holmes, writing for the majority, noted that "[a] . . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. at 416, 43 S.Ct. at 160, 67 L.Ed. at 326. Rather, the general rule as enunciated in *Pennsylvania Coal* is that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415, 43 S.Ct. at 160, 67 L.Ed. at 326.

The test which emerged from *Pennsylvania Coal* is that a reviewing court should first determine whether a regulation sufficiently implicates the public interest such that a state can enact it as a legitimate police power measure; and second, determine the extent of diminution in value suffered by the property owner. If the regulation goes too far, it is a taking for which an owner must be compensated. The test has recently been more succinctly stated to be that land use regulation can effect a taking if

it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 225, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980).

After *Pennsylvania Coal*, the *Mugler* rule was no longer viewed as dispositive. In fact, the *Mugler* approach was essentially the same as that of the minority opinion in the *Pennsylvania Coal* case: that as long as a regulation serves an appropriate means to public end, restriction upon use does not constitute a taking merely because it deprives the owner of the property's only profitable use. *Pennsylvania Coal v. Mahon*, 260 U.S. at 417, 43 S.Ct. at 160, 67 L.Ed. at 326. (Brandeis, J. dissenting). Therefore, after *Pennsylvania Coal*, the *Mugler* case was thought by many to have fallen by the wayside. This perception was dispelled however, five years later with the Supreme Court's decision in *Miller v. Schoene, supra*. In *Miller*, the Supreme Court, applying *Mugler*, upheld a statute which required the owners of red cedar trees to destroy the trees because they produced cedar rust, a disease fatal to the state's apple crop. Thus, after *Miller*, some confusion existed as to whether to apply the *Mugler* rule or that of *Pennsylvania Coal*. In two subsequent cases, *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) and *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court applied, respectively, the *Mugler* rule and the *Pennsylvania Coal* test.

In *Goldblatt v. Hempstead, supra*, the Supreme Court upheld, pursuant to a *Mugler* nuisance analysis, a statute forbidding excavation of sand below the water line. The

Goldblatt Court nonetheless recognized that certain regulation may be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 133.

In *Penn Central Transportation Company v. New York City, supra*, the Supreme Court upheld a landmark preservation law which prohibited Penn Central Railroad from erecting an office tower on top of the Grand Central Railroad Terminal. In *Penn Central* the Court candidly admitted that it had previously been unable to develop any "set formula" for determining when "justice and fairness" require the government to compensate landowners. 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. In upholding the preservation law, the Court applied the *Pennsylvania Coal* test and determined that because the regulation served a strong public interest, did not completely destroy the economic value of the property, and did not substantially interfere with reasonable investment backed expectations it did not constitute a taking. The test first enunciated in *Pennsylvania Coal*, therefore continued in *Penn Central* to be that regulation can effect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of its land." Because the preservation law advanced a legitimate state interest and the owner retained economically viable use of the terminal, a taking was determined not to have occurred.

The next significant decision of the Supreme Court to address the test to be applied in regulatory takings cases is *Keystone Bituminous Coal Association v. Debenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In *Keystone*, the plaintiffs challenged the constitutionality of a

Pennsylvania statute known as the Bituminous Mine Subsidence and Land Conservation Act. The Subsidence Act required coal companies to keep in the ground at least 50% of the coal beneath defined structures to protect these structures from subsidence damage. Although the Supreme Court held that a taking had not occurred the method by which it arrived at this holding has been the subject of considerable debate. Part of the reason for this debate is the persistent confusion over when *Mugler* is applicable. Although it continues to recognize the vitality of the *Mugler* line of cases, the *Keystone* Court nonetheless continues to retain the two prong test first recognized in *Pennsylvania Coal*. The *Keystone* Court unequivocally recognizes that it retains this as the test by stating:

> "The two factors that the Court considered relevant [in *Pennsylvania Coal*], have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (citations omitted); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978)."

and continues by holding that: "[a]pplication of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the [Act] constitutes a taking." 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. Clearly, then, despite the myriad of considerations which go into an analysis of the factors

included in the above mentioned test, it still emerges as the test after *Keystone*.

The first prong of this traditional test is discussed under the heading of "The Public Purpose." *Keystone Bituminous Coal Association v. Debenedictis*, 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. It is at this point that the Court explicitly holds that its *Mugler* line of cases were not overruled by *Pennsylvania Coal*, 480 U.S. at 490, 107 S.Ct. at 1244, 94 L.Ed.2d at 491. The Court then goes on to affirm that a state's interest in "preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." 480 U.S. at 492, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court further holds that the act at issue in *Keystone* "plainly seeks to further such an interest." *Id.* In so holding the *Keystone* Court equates subsidence mining to the nuisances sought to be abated in the *Mugler* line of cases. Accordingly, the *Keystone* opinion reaffirms the teaching of *Mugler* that certain uses are so noxious that an owner is not entitled to compensation, and that "the nature of the state action plays [an important role] in our takings analysis." 480 U.S. at 490, 107 S.Ct. at 1245, 94 L.Ed.2d at 491. Although the *Keystone* opinion marks a continued recognition of the *Mugler* rule, it does not abolish the *Pennsylvania Coal* factors. Further, the *Keystone* Court does not hold that every exercise of police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate the takings clause. Indeed, if we were to accept an interpretation of *Keystone*, based on *Mugler*, that any exercise of police power could not effect a taking, we would have to say that there would never be any need to reach

the second part of the test: diminution in value. No matter how valueless a person's property, if the taking was pursuant to a valid exercise of the police power it could *never* be compensated. As feared by the dissenters in *Keystone*, this could become an exception which would swallow the rule. *Keystone*, 480 U.S. at 512, 107 S.Ct. at 1256, 94 L.Ed.2d at 505 (Rehnquist, J., dissenting).

The Constitution of the United States and of South Carolina provided a just compensation clause for the protection of citizens; surely the framers of these constitutions never intended for this protection to be distinguished away in order to allow States to avoid compensating an individual required to bear a burden which in fairness should be borne by all. Therefore, I simply refuse to accept that the *Mugler* line of cases "grant carte blanche to government agencies to regulate private property into oblivion." Berger, *The Year of the Taking Issue*, 1 B.Y.U.J. Pub.L. 261, 279 (1987). Rather I would hold that some factual situations may lend themselves to the harsh rule in *Mugler*, whereas others must be recognized as situations in which one individual should not be called upon to bear a burden which in fairness should be borne by all. My interpretation of *Keystone* is that a court must first review the public purpose of a regulation. Some regulations will be held unconstitutional because the public purpose for which they are enacted is not deemed to be legitimate or sufficient. Other regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner. Other regulations not designed to prevent a nuisance may nonetheless legitimately advance state

interests and yet require compensation upon a showing of a loss of economically viable use of land.

In my opinion the Beachfront Management Act does not have as its *primary* purpose the prevention of a nuisance and is therefore not subject to the *Mugler* analysis. The activities and effects the Act seeks to prohibit do not rise to such a level as to be fairly considered "noxious." The primary purpose of the Beachfront Management System is to protect and foster the regeneration of the beach/dune system, the benefits of which enure to the State of South Carolina by among other things, promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion. The Act also lists other similar findings and policies of the Act. Upon my review of the Act, I conclude that none of these intended purposes can fairly be said to resemble a nuisance. The goals which the Act seeks to accomplish do not appear in any way similar to protecting an important state resource from an infectious disease (*Miller v. Schoene*), prohibiting excavations below the water table for safety purposes (*Goldblatt*), prohibiting an illegal use of a distillery (*Mugler*), preserving the residential integrity of an area by prohibiting a brickyard (*Hadacheck*) or protecting patrons of a downtown area from the unpleasantness associated with a livery stable (*Reinman*). Accordingly, I do not find as did the *Keystone* Court, that the Act at issue here plainly seeks to further "public interest in preventing activities similar to public nuisances" such that it is entitled to the protection afforded by *Mugler*.

This is not to say that the Act itself is invalid. Even though an act is not of the *Mugler* variety, it can remain valid if it nonetheless advances a legitimate state interest. However, if it is not a *Mugler* type act, despite the fact that it advances a legitimate state interest, compensation will be necessary where the act deprives an owner of economically viable use of his land. Lucas has conceded the "laudable" goals of the Act and does not challenge the legitimacy of its public purpose. Thus, the remaining question is whether his property retains economically viable use.

Although, the *Keystone* Court indicated that it could end its analysis with its determination that the Subsidence Act sought to "prevent activities similar to public nuisances," it held that it "need not rest [its] decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal*[3] and our other regulatory takings cases." *Keystone Bituminous Coal v. Debenedictis*, 480 U.S. at 493, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court did not have to reach the diminution in value question because the only issue left to it by the federal district court was whether the "mere enactment of the statutes and regulations constitutes a taking." *Id*. The next phase of the case would have concerned evidence about the actual effects the Subsidence Act had on the owners' property.

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[3] We note that this is another reference by the *Keystone* Court to the continued vitality of the *Pennsylvania Coal* test.

In assessing the question of whether Lucas retains any economically viable use of his land, we are nonetheless guided by the *Keystone* decision. The *Keystone* court held that the critical distinction in this regard involves a comparison of the value that has been taken from the property with the value that remains in the property. 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. "[W]here an owner possesses a full bundle of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id*. [citation omitted]. Applying these factors, the *Keystone* Court determined that

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.

480 U.S. at 499, 107 S.Ct. at 1249, 94 L.Ed.2d at 497. The Court further determined that there was no showing that "petitioners' reasonable investment backed expectations" were materially affected. *Id*.

The facts of *Keystone* contrast sharply with those present in this case. The testimony in this case was that Lucas purchased two lots for development. Lucas planned to erect single family dwellings on the lost and intended to put one-home on the market for sale and retain one for his family. At the time Lucas invested in these lots, his reasonable expectations were that he could proceed with these plans. However, according, to the

testimony of Lucas' appraiser, the Act's prohibition against the erection of any habitable structure caused the value of the lots to plummet to zero. The lost now lack fair market value and there is no economically viable use. Although the Coastal Council introduced testimony that the lost would have some value, its expert was completely unable to explain the method relied upon to arrive at this conclusion. The trial judge chose the conclusion of Lucas' expert over that of the Coastal Council's expert. This Court generally defers to the discretion of the trial judge on these matters because he is in a better position to observe the demeanor of the witnesses and pass on their credibility. Further, from my own review of the record, I find the valuation of Coastal Council's expert to have been totally speculative. Accordingly, since Lucas' land has no fair market value, I would hold that the second part of the test, deprival of economically viable use, has been met and a taking has been established.

Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution.[4] The

---

[4] There are several South Carolina decisions involving takings under the compensation clause. One of the most recent cases is *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) in which we held that restrictions which disallowed a landowner from filling in wetlands did not constitute a taking. In *Carter*, this Court did not specify whether its analysis of the takings issue was pursuant to federal or state law. Regardless, I do not see *Carter* as controlling under the facts of this case particularly since we must look to federal decisions for the proper interpretations of the United States

(Continued on following page)

remaining question is the appropriate remedy to be afforded the property owner now that a taking has been determined. The most recent amendments to the Act, specifically, S.C. Code Ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp.1990), provide that an applicant may request a special permit to build a structure other than an erosion control structure or device seaward of the baseline that is not otherwise allowed pursuant to Sections 48-39-250 through 48-39-360. If Lucas' application is denied, in the alternative, I would hold that Lucas be compensated for the loss of use of the land pursuant to the circuit court order.

Although I affirm the decision of the circuit court that a taking occurred, I would remand the matter to the Coastal Council for its decision as to whether to issue permits in view of the recent 1990 amendments to the Beachfront Management Act for construction of a habitable structure on the lots. If the Council should decline to issue such special permit, I would require that Lucas be compensated pursuant to the circuit court order.

CHANDLER, J., concurs.

(Continued from previous page)

Constitution. In *Carter*, we held that every regulation "will not necessarily be a (taking) in the constitutional sense." Implicit in this is a recognition that there nonetheless will be situations where regulation will be a taking. As indicated by the analysis in this opinion, I would hold that this is one of those situations.

APPENDIX B

SEAL

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

June 17, 1991

Ellison D. Smith, IV, Esquire
P.O. Box 579
Charleston, S.C. 29402-0579

Gedney M. Howe, III
P.O. Box 1034
Charleston, S.C. 29402-1034

Re: David H. Lucas v. South Carolina Coastal Council

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/ George T. Gregory, Jr. C.J.

s/ Ernest A. Finney, Jr. A.J.

s/ Jean H. Toal A.J.

"Petition for Rehearing
granted.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

June 17, 1991."

APPENDIX C

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS C/A No. 88-CP-10-66
DAVID H. LUCAS, Plaintiff, -vs- SOUTH CAROLINA COASTAL COUNCIL, Defendant.	ORDER (Filed August 14, 1989)

This matter came for trial before me in Charleston, South Carolina on August 7, 1989.

The plaintiff, David H. Lucas, is the fee owner of two undeveloped, oceanfront lots located in the Wild Dunes development on the Isle of Palms in Charleston County, South Carolina. The two lots described during the trial as Lots 22 and 24, are in the Beachwood East Subdivision of the Isle of Palms, have road frontage on Beachwood East Drive, are roughly rectangular in shape, and have similar dimensions. Both lots are approximately 90 feet in width and 160 feet in depth. Lucas purchased the two lots on December 3, 1986 and paid $475,000 for Lot 22 and $500,000 for Lot 24. Both sales were arm-lengths transactions. At the time Lucas acquired the lots, it was his intention to build a single-family residence for himself and his family on Lot 24, and to hold Lot 22 as an investment. Prior to July 1, 1988 there were no restrictions

imposed by either the state, the county, or the municipality of the Isle of Palms which would have prevented single-family residential development on either one or both lots. Both lots are mortgaged to the North Carolina National Bank and as of July 1, 1988 the mortgage balance on the two lots was $495,000 and the interest rate on the mortgages was 11%.

Mr. Lucas's planned usage of the lots came to an abrupt halt on July 1, 1988 when the Coastal Zone Management Act was amended by Act 634 of the South Carolina General Assembly commonly known as the Beachfront Management Act. The Act attempts to regulate both present and future development along the coastline of the State of South Carolina by imposing statutorily mandated setback lines along the entire coast. The imaginary lines are referred to in the Beachfront Management Act as a baseline and a setback line. Under the Act's regulatory scheme, no habitable structure or recreational facility can be built seaward of the baseline. In fact, the only type of construction that can take place on the ocean side of the baseline is a walkway to the ocean and a small deck. In essence, undeveloped property located seaward of the baseline, pursuant to the statute, remains forever undeveloped.

The agency which is responsible for administering the Beachfront Management Act is the South Carolina Coastal Council. Following the guidelines of the Act, the South Carolina Coastal Council was and is responsible for establishing the location of the setback lines imposed by the Act. In furtherance of its statutory responsibility, the South Carolina Coastal Council established both a

baseline and a setback line within the Wild Dunes' portion of the Isle of Palms shortly after July 1, 1988, the effective date of the Beachfront Management Act. Lucas's two lots lie entirely seaward of the baseline. In fact, the baseline actually is located on Beachwood East, the road providing access to Lucas's lots.

Because the lines set by the South Carolina Coastal Council under the Beachfront Management Act precluded Lucas from building residences or making any other meaningful use of his two lots, he instituted this action in the Court of Common Pleas for Charleston County in which he asserted that the restrictions on the use of his two lots amounted to a taking of his private property for public purposes entitling him to receive just compensation. Lucas's complaint does not challenge the constitutionality of the Beachfront Management Act, nor does it challenge the right of the General Assembly to regulate the use of his property. Lucas simply maintains that the Act amounts to a condemnation of his property and that he is entitled under the Constitution of the United States of America and the State of South Carolina to just compensation.

The South Carolina Coastal Council, in its answer to Lucas's complaint, denied that a taking had occurred for which the state was required to pay just compensation, but by way of affirmative defense, alleged that if a taking had occurred, Lucas's remedy was not the payment to him of just compensation, but rather some form of administrative remedy which would allow him some use of his property, notwithstanding the provisions of the Beachfront Management Act.

The court, after hearing testimony of the witnesses, reviewing the exhibits introduced into evidence, and hearing arguments of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find that David H. Lucas is the owner in fee simple of Lots 22 and 24 on the Isle of Palms, Charleston County, South Carolina, and that he purchased the lots on December 3, 1986 in an arms-length transaction and paid $475,000 for Lot 22 and $500,000 for Lot 24.

I find that at the time Lucas purchased the two lots, both were zoned for single-family residential construction and that there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.

I find that the two lots in question are rectangular in shape and are approximately ninety feet in width and one hundred sixty feet in depth, and as of July 1, 1988, the distance from the seaward lines of both lots to the mean high water mark of the Atlantic Ocean was approximately one hundred yards.

I find that Lot 22 is separated from Lot 24 by Lot 23.

I find that Lot 23 is under separate ownership and is improved with a substantial single-family residence which was built in the early 1980's. I further find that there are single-family residences on similar oceanfront lots both to the east and west of Lots 22 and 24.

I find that the real property taxes on both Lots 22 and 24 are in the amount of $1,700 a year per lot and that there are no taxes currently owing on either lot.

I find that as of July 1, 1988, a mortgage existed on both lots in the principal amount of $495,000 with an interest rate of 11% and that Lucas is current with his monthly mortgage payments.

I find that in the past there have been incidences of spot erosion in the vicinity of Lucas's two lots and that the worst recent erosion occurred in 1983. Since that time, accretion has continued in this area.

I find that as of July 1, 1988, neither lot can be utilized for single-family residential construction and further that the only construction that can now take place on either lot is the erection of a walkway over the sand dunes or a small deck.

I find that the prohibition on construction imposed on these two lots is permanent.

I find and the parties have so stipulated for the purposes of this case, that the setback lines established by the Coastal Council are final lines and will not be moved.

I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless.

I find that Lucas paid the aggregate sum of $975,000 for the two lots on December 3, 1986.

I find that as of July 1, 1988, the aggregate fair market value of the two lots was $1,170,000 or $585,000 per lot.

I find that Lucas had paid interest since July 1, 1988 in the amount of $58,987.50 on the mortgages covering said properties.

Both Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution are limitations on the power of the sovereign. Both constitutional provisions provide that if private property is taken for public use, just compensation must be paid. It is self-evident that the two oceanfront lots owned by Lucas are private property in the most traditional sense of the term and it is equally self-evident that the Beachfront Management Act was enacted to preserve the state's beaches for the benefit of the general public. The effect of the setback line imposed by the Beachfront Management Act on Lucas's two lots is to render property which was otherwise perfectly suitable for single-family residential development valueless. The damage to the two lots by virtue of the restrictions prohibiting any form of development is total.

Nearly fifty years ago our court in *Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940), defined the essential elements constituting ownership of private property:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. (cite

> omitted) If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right.
>
> The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment. 9 S.E.2d at 873.

It is manifest that the South Carolina Coastal Council in its enforcement of the Beachfront Management Act has deprived Lucas of all of the essential elements of ownership.

As to the contention by the defendant that this court should remand this matter for further administrative purposes, the controlling Act does not indicate this to be proper under the facts of this case. Furthermore, the Constitutional provisions under which plaintiff claims, have long been held to be self-executing and does not require independent statutory authorization.

While there has been no physical invasion of Lucas's property by the State of South Carolina such as you have when the state condemns property to build roads, for example, the damage is nonetheless severe because of the regulation of the use of the property. Our court has long recognized that governmental regulation can amount to a taking of private property. *E.G., Hill v. City of Hanahan*, 281 S.C. 201, 314 S.E.2d 327 (Ct. App. 1984); *Painter v. Town of Forrest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957); *Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E.2d 689 (1934). Recently, the United States Supreme Court has

also held that regulatory activity by a governmental agency which denies an owner economically viable use of his land amounts to a taking under the Fifth Amendment of the United States Constitution for which just compensation must be paid. *First English Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *see also, Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141, 96 L.Ed.2d ___ (1987).

It is manifest that the imposition of the setback lines by the Coastal Council have resulted in a total taking of Lucas's two beachfront lots. Accordingly, Lucas is entitled under both the State and Federal Constitutions to the payment of just compensation. Based upon my finding of facts above, I conclude that just compensation includes the following:

(a) Fair market value of the two lots as of July 1, 1988, in the amount of $1,170,000;

(b) Real property taxes paid on the property since July 1, 1988, in the amount of $3,400;

(c) Simple interest on the mortgage balance of $495,000 at 11% in the amount of $58,987.50.

Obviously, since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any incumbrances.

Based upon the foregoing,

IT IS, THEREFORE, ORDERED that plaintiff have judgment against the defendant in the sum of $1,232,387.50, plus interest at the legal rate until the judgment is satisfied;

IT IS FURTHER ORDERED that upon satisfaction of the judgment the plaintiff is ordered to tender deeds to Lots 22 and 24 to the State of South Carolina or its designee.

AND IT IS SO ORDERED.

/s/ _____
Presiding Judge,
Ninth Judicial Circuit

Charleston, South Carolina

8-10, 1988

ATTEST: A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK, C. P. & C. S.
By Scott Brown
DEPUTY CLERK

APPENDIX D

CHAPTER 39
Coastal Tidelands and Wetlands

SEC.

48-39-10. Definitions.

48-39-20. Legislative declaration of findings.

48-39-30. Legislative declaration of state policy.

48-39-40. Creation of South Carolina Coastal Council; members; terms.

48-39-50. Powers and duties of Council.

48-39-60. Personnel provided by Wildlife and Marine Resources Department.

48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

48-39-80. Development of coastal management program.

48-39-90. Public hearings on management plan.

48-39-100. Plan developed in cooperation with local governments.

48-39-110. Submission of plan by State Ports Authority.

48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

48-39-130. Permits required to utilize critical areas.

48-39-140. Submission of development plans; application for permits.

48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

48-39-150. Approval or denial of permits; appeal to Council.

48-39-160. Violations; jurisdiction of courts.

48-39-170. Penalties.

48-39-180. Judicial review of permit determinations.

48-39-190. Lands not affected by chapter.

48-39-200. Restriction of Council's regulatory authority.

48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

48-39-220. Legal action to determine interest in tidelands.

§ 48-39-10. Definitions.

As used in this chapter:

(A) "Applicant" means any person who files an application for a permit under the provisions of this chapter.

(B) "Coastal zone" means all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.

(C) "Council" means the South Carolina Coastal Council.

(D) "CCPS" means Coastal Council Permitting Staff.

(E) "Saline waters" means those waters which contain a measurable quantity of sea water, at least one part chloride ion per thousand.

(F) "Coastal waters" means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. *Provided*, however, that the Council may designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

(G) "Tidelands" means all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction. *Provided*, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, until such time as the exact geographic extent of this definition can be scientifically determined, the Council shall have the authority to designate its approximate geographic extent.

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

(I) "Primary ocean frot sand dunes" means those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean.

(J) "Critical area" means any of the following: (1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean from sand dunes.

(K) "Person" means any individual, organization, association, partnership, business trust, estate trust, corporation, public or municipal corporation, county, local government unit, public or private authority and shall include the State of South Carolina, its political subdivisions and all its departments, boards, bureaus or other agencies, unless specifically exempted by this chapter.

(L) "Estuarine sanctuary" means a research area designated as an estuarine sanctuary by the Secretary of Commerce.

(M) "Marine sanctuary" means any water and wetland areas designated as a marine sanctuary by the Secretary of Commerce.

(N) "Minor development activities" means the construction, maintenance, repair or alteration of any private piers or erosion control structure, the construction of which does not involve dredge activities.

(O) "Dredging" means the removal or displacement by any means of soil, sand,

gravel, shells or other material, whether of intrinsic value or not, from any critical area.

(P) "Filling" means either the displacement of saline waters by the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise.

(Q) "Submerged lands" means those river, creek and ocean bottoms lying below mean low-water mark.

(R) "Oil" means crude petroleum oil and all other hydrocarbons, regardless of specific gravity, that are produced in liquid form by ordinary production methods, but does not include liquid hydrocarbons that were originally in a gaseous phase in the reservoir.

(S) "Gas" means all natural gas and all other fluid hydrocarbons not hereinabove defined as oil, including condensate because it originally was in the gaseous phase in the reservoir.

(T) "Fuel" means gas and oil.

(U) "Emergency" means any unusual incident resulting from natural or unnatural causes which endanger the health, safety or resources of the residents of the State, including damages or erosion to any beach or shore resulting from a hurricane, storm or other such violent disturbance.

HISTORY: 1977 Act No. 123 § 3.

Research and Practice References –

Barrier Islands: The Conflict Between Federal Programs That Promote Preservation and Those That Promote Development. 33 SC L Rev 373, December 1981.

ATTORNEY GENERAL'S OPINIONS

The first part of the definition of "tielands" as it appears in Act No. 123 of 1977 includes fresh and saline waters but is limited to areas that are an integral part of an estuarine system. 1976-77 Op Atty Gen. No. 77-257, p. 190.

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§ 48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

(B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in

the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.

(C) A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only regain control of the regulation of its critical areas by developing its own management program. The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

HISTORY: 1977 Act No. 123 § 1.

Cross references –

As to soil and water conservation districts, *see* Chapter 9 of Title 48.

As to tax credits for construction and installation or restoration of water impoundments and water control structures, *see* § 12-7-617.

As to waters, water resources and drainage, *see* Title 49.

As to fish, game and watercraft, generally, *see* Title 50.

As to Coastal Fisheries Law, *see* Chapter 17 of Title 50.

As to ports and maritime matters, *see* Title 54.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

§ 48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

(3) To formulate a comprehensive tidelands protection program;

(4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

(C) In the implementation of the chapter, no government agency shall adopt a rule or regulation or issue

any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or the United States.

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

HISTORY: 1977 Act No. 123 § 2.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is hereby created the South Carolina Coastal Council which shall consist of eighteen members as follows: Eight members, one from each coastal zone

county, to be appointed by the local county governing body; six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in such district, each such House or Senate member to have one vote; and the following legislative members who shall serve ex officio: Two state Senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game and Forestry Committee; and two members of the House of Representatives to appointed by the Speaker of the House. The Council shall elect a chairman, vice-chairman and such other officers as it deems necessary.

(B) Terms of legislative members shall be coterminous with their terms as members of the General Assembly. Terms of all non-legislative members shall be for four years and until successors are appointed and qualify, except that of those initially appointed three of the members appointed by county governing bodies and two members from congressional districts shall serve terms of two years only as determined by lot at the first meeting of the Council. Vacancies shall be filled in the original manner of selection for the unexpired term.

HISTORY: 1977 Act No. 123 § 4.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

ATTORNEY GENERAL'S OPINIONS

The provision of § 48-39-40 of the Code of Laws of South Carolina, 1976, as amended, which provides that members of the Legislature shall serve as *ex officio* members of the South Carolina Coastal Council violates the Separation of Powers Doctrine, Article I, Section 8, of the Constitution of the State of South Carolina. 1982 Op Atty Gen. No 82-26, p. 31.

§ 48-39-50. Powers and duties of Council.

The Council shall have the following powers and duties:

(A) To employ the CCPS consisting of, but not limited to, the following professional members: An administrator and other staff members to include those having expertise in biology, civil and hydrological engineering, planning, environmental engineering and environmental law.

(B) To apply for, accept and expend financial assistance from public and private sources in support of activities undertaken pursuant to this chapter and the Federal Coastal Zone Management Act of 1972.

(C) To undertake the related programs necessary to develop and recommend to the Governor and the General Assembly a comprehensive program designed to promote the policies set forth in this chapter.

(D) To hold public hearings and related community forums and afford participation in the development of management programs

to all interested citizens, local governments and relevant state and federal agencies, port authorities and other interested parties.

(E) To promulgate necessary rules and regulations to carry out the provisions of this chapter.

(F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it.

(G) To examine, modify, approve or deny applications for permits for activities covered by the provisions of this chapter.

(H) To revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit.

(I) To enforce the provisions of this chapter and all rules and regulations promulgated by the Council and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter.

(J) To manage estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary.

(K) To establish, control and administer pipeline corridors and locations of pipelines used for the transportation of any fuel on or in the critical areas.

(L) To direct and coordinate the beach and coastal shore erosion control activities

among the various state and local governments.

(M) To implement the state policies declared by this chapter.

(N) To encourage and promote the cooperation and assistance of state agencies, coastal regional councils of government, local governments, federal agencies and other interested parties.

(O) To exercise all incidental powers necessary to carry out the provisions of this chapter.

(P) To coordinate the efforts of all public and private agencies and organizations engaged in the making of tidal surveys of the coastal zone of this State with the object of avoiding unnecessary duplication and overlapping.

(Q) To serve as a coordinating state agency for any program of tidal surveying conducted by the federal government.

(R) To develop uniform specifications and regulations for tidal surveying.

(S) To monitor, in coordination with the South Carolina Department of Wildlife and Marine Resources, the waters of the State for oil spills. If such Department observes an oil spill in such waters it shall immediately report such spill to the South Carolina Department of Health and Environmental Control, the United States Coast Guard and Environmental Protection Agency. This in no way negates the responsibility of the spiller to report a spill.

(T) To direct, in coordination with the South Carolina Department of Health and Environmental Control as the designated state agency to provide liaison to the regional response team, pursuant to Section 1510.23 of the National Contingency Plan, state supervised removal operations of oil discharged into the waters within the territorial jurisdiction of this State and entering such waters after being discharged elsewhere within the State, and to seek reimbursement from the National Contingency Fund for removal operations cost expended by it and all other agencies and political subdivisions including county, municipal and regional governmental entities in removing such oil as provided for in Section 311(C)(2) of the Federal Water Pollution Control Act.

(U) To act as advocate, where the Council deems such action appropriate, on behalf of any person who is granted a permit for a specific development by the Council but is denied a permit by a federal agency for the same specific development.

(V) To delegate any of its powers and duties to the CCPS.

HISTORY: 1977 Act No. 123 § 5.

Federal Aspects –

As to Federal Coastal Zone Management Act, see 16 USCS §§ 1451 et seq.

As to Federal Water Pollution Control Act, see 33 USCS §§ 1251 et seq.

As to National Contingency Plan, see 40 CFR Part 1510.

ATTORNEY GENERAL'S OPINIONS

The responsibility for cleaning up chemical and petroleum spills which occur in this State rests upon the polluter. 1981 Op Att'y Gen. No. 81-83, p 107.

§ 48-39-60. Personnel provided by Wildlife and Marine Resources Department.

When requested by the Council, the Wildlife and Marine Resources Department shall provide additional staff for the Council, including any additional conservation officers, necessary to administer the provisions of this chapter and for which funds are available.

HISTORY: 1977 Act No. 123 § 6.

Cross references –

As to composition and organization of Wildlife and Marine Resources Department, see Article 1 of Chapter 3 of Title 50.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

(A) All other state and local agencies and commissions shall cooperate with the Council in the administration of enforcement of this chapter. All agencies currently exercising regulatory authority in the coastal zone shall administer such authority in accordance with the provisions of this chapter and rules and regulations promulgated thereunder.

(B) The Council in the discharge of its duties may administer oaths and affirmations, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary in connection with the work of the Council. The only exception shall be, that information considered proprietary by the applicant. If in the opinion of the Council a proper decision cannot be rendered without the submission of such proprietary information, the Council shall be empowered to execute an agreement on confidentiality with the applicant and such information shall not be made a part of the public record of current or future proceedings.

(C) In case the contumacy by any person or refusal to obey a subpoena issued to any person, any circuit court of this State or circuit judge thereof within the jurisdiction of which such person guilty of contumacy or refusal to obey is found, resides or transacts business, upon application by the Council, may issue to such person an order requiring him to appear before the Council to produce evidence if so ordered or give testimony touching the matter under investigation. Any failure to obey an order of the court may be punished as a contempt hereof. Subpoenas shall be issued in the name of the Council and signed by the Council chairman. Subpoenas shall be issued to such persons as the Council may designate.

HISTORY: 1977 Act No. 123 § 7.

Research and Practice References –

Barrier Islands: The Conflict Between Federal Programs That Promote Preservation and Those That Promote Development. 33 SC L Rev 373, December 1981.

§ 48-39-80. Development of coastal management program.

The council shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the Council shall:

(A) Provide a regulatory system which the Council shall use in providing for the orderly and beneficial use of the critical areas.

(B) In devising the management program the Council shall consider all lands and waters in the coastal zone for planning purposes. In addition, the Council shall:

(1) Identify present land uses and coastal resources.

(2) Evaluate these resources in terms of their quality, quantity and capability for use both now and in the future.

(3) Determine the present and potential uses and the present and potential conflicts in uses of each coastal resource.

(4) Inventory and designate areas of critical state concern within the coastal

zone, such as port areas, significant natural and environmental, industrial and recreational areas.

(5) Establish broad guidelines on priority of uses in critical areas.

(6) Provide for adequate consideration of the local, regional, state and national interest involved in the siting of facilities for the development, generation, transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.

(7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.

(8) Provide for a review process of the management plan and alterations thereof that involves local, regional, state and federal agencies.

(9) Conduct other studies and surveys as may be required, including the beach erosion control policy as outlined in this chapter.

(10) Devise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.

(11) Develop a system whereby the Council shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan.

(C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.

(D) Consider in conjunction with the Department of Health and Environmental Control the planning and review of existing water quality standards and classifications in the coastal zone.

(E) Provide consideration for nature-related users of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame habitat protection projects and endangered flora and fauna.

HISTORY: 1977 Act No. 123 § 8.

§ 48-39-90. Public hearings on management plan.

(A) The Council, on thirty days' notice, shall hold statewide public hearings on the proposed coastal zone management plan to obtain the views of all interested parties, particularly all interested citizens, agencies, local governments, regional organizations and port authorities.

(B) All Council documents associated with such hearings shall be conveniently available to the public for review and study at least thirty days prior to a hearing. A

report on each hearing shall be prepared and made available to the public within forty-five days of such hearing.

(C) After sufficient hearings and upon consideration of the views of interested parties the Council shall propose a final management plan for the coastal zone to the Governor and the General Assembly.

(D) Upon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan for the State's coastal zone.

(E) Any change in or amendment to the final management plan shall be implemented by following the procedures established in subsections (A), (B), (C) and (D) of this section and upon the review and approval of the Governor and the General Assembly.

HISTORY: 1977 Act No. 123 § 9.

§ 48-39-100. Plan developed in cooperation with local governments.

(A) The management program specified in § 48-39-90 shall be developed in complete cooperation with affected local governments in the coastal zone. This cooperation shall include, but not be limited to:

(1) Involvement of local governments or their designees in the management program.

(2) Provision of technical assistance and grants to aid local governments in carrying out their responsibilities under this chapter.

(3) Dissemination of improved informational data on coastal resources to local and regional governmental units.

(4) Recommendations to local and regional governmental units as to needed modifications or alterations in local ordinances that become apparent as a result of the generation of improved and more comprehensive information.

(B) Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the Council for review. The Council shall evaluate such ordinances and plans to determine that they meet the provisions of this chapter and rules and regulations promulgated hereunder. Upon determination and approval by the Council, such ordinances and regulations shall be adopted by the Council, followed by the Council in meeting its permit responsibilities under this chapter and integrated into the Council's Coastal Management Program. Any change or modification in the elements of approved zoning ordinances, subdivision regulations or building codes applying to critical areas shall be disapproved by the Council if it is not in compliance with the provisions of this chapter and rules and regulations promulgated hereunder.

(C) Any city or county that is not currently enforcing ordinances or regulations on the critical areas within its jurisdiction at its option may elect to develop a management program for such critical areas by notifying the Council of its intent within one hundred and eighty days

following the 24th day of May, 1977. Such proposed ordinances and regulations applying to critical areas shall be subject to the process specified in § 48-39-100(B).

(D) Any county or city may delegate some or all of its responsibilities in developing a coastal management program for critical areas under its jurisdiction to the regional council of government of which it is a part, provided the county or city has notified the Council in writing at least thirty days prior to the date on which such action is to be taken.

HISTORY: 1977 Act No. 123 § 10.

§ 48-39-110. Submission of plan by State Ports Authority.

The South Carolina State Ports Authority shall prepare and submit to the Council a management plan for port and harbor facilities and navigation channels. Upon approval by the Council of such management plan it shall become part of the comprehensive coastal management program developed by the Council. The South Carolina State Ports Authority shall include in the management plan a designation of the geographical area appropriate for use by public and private port and harbor facilities and military and naval facilities and submit this to the Council for approval.

HISTORY: 1977 Act No. 123 § 11.

Cross references –

As to purposes and powers of South Carolina State Ports Authority, generally, see Article 3 of Chapter 3 of Title 54.

ATTORNEY GENERAL'S OPINIONS

The South Carolina Ports Authority and the South Carolina Public Service Authority do not come within the definition of State agency as that term is used by the General Assembly in § 24 of the General Appropriations Act 1978-1979. 1978 Op Att'y Gen, No 78-210, p 243.

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

(A) The Council shall develop and institute a comprehensive beach erosion control policy that identifies critical erosion areas, evaluates the benefits and costs of erosion control structures funded by the State, considers the dynamic littoral and offshore drift systems, sand dunes and like items.

(B) The Council for and on behalf of the State may issue permits for erosion control structures following the provisions of this section and §§ 48-39-140 and 48-39-150, on or upon the tidelands and coastal waters of this State as it may deem most advantageous. *Provided*, however, that no property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary. *Provided*, further that no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.

(C) The Council shall have the authority to remove all erosion control structures which have an adverse effect on the public interest.

(D) The Council is authorized for and in behalf of the State to accept such federal monies for beach or shore erosion control in areas to which the public has full and complete access as are available and to sign all necessary agreements and to do and perform all necessary acts in connection therewith to effectuate the intent and purposes of such federal aid.

(E) If a beach or shore erosion emergency is declared by the Council, the State, acting through the Council, may spend whatever state funds are available to alleviate beach or shore erosion in areas to which the public has full and complete access, including any funds which may be specifically set aside for such purposes.

(F) The Council, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

HISTORY: 1977 Act No. 123 § 12.

Cross references –

As to the applicability of the Erosion and Sediment Reduction Act, *see* § 48-18-30.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L. Rev. 627.

The South Carolina Coastal Zone Act of 1977. 29 SC L Rev 666.

§ 48-39-130. Permits required to utilize critical areas.

(A) Ninety days after July 1, 1977, no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the Council.

(B) Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating the granting or denying all permit applications until such time as the final rules and regulations are adopted in accordance with this section and Chapter 23 of Title 1. Within one hundred and twenty days of July 1, 1988 the Council shall publish and make available to local and regional governments and interested citizens for review and comment a draft of the final rules and regulations it will follow in evaluating permit applications. Sixty days after making such guidelines available the Council shall hold a public hearing affording all interested persons an opportunity to comment on such guidelines. Following the public hearing the Council shall in ninety days publish final rules and regulations. *Provided*, however, the interim rules and regulations shall not be subject to the provisions of Chapter 23 of Title 1.

(C) Ninety days after July 1, 1977 no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the Council. *Provided*, however, that a person who had legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit. Any person may request the Council to review any project or activity to determine if he is exempt under this section from the activity to determine if he is exempt under this section from the provisions of this chapter. The Council shall make such determinations within forty-five days from the receipt of any such request.

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of any duly appointed official of a county, municipality or of the State, acting to protect the public health and safety, upon notification to the Council.

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

(3) The discharge of treated effluent as permitted by law; *provided*, however, that the Council shall have the authority to review and comment on all proposed permits that would affect critical areas.

(4) Dredge and fill performed by the United States Corps of Engineers for the maintenance of the harbor channels and the collection and disposal of the materials so dredged; *provided*, however, that the Council shall have authority to review and certify all such proposed dredge and fill activities.

(5) Construction of walkways over sand dunes in accordance with regulations promulgated by the Council.

(6) Emergency repairs to any existing bank, dike or structure which has been erected in accordance with federal and state laws, including fishing piers which are provided for by general law or acts passed by the General Assembly of South Carolina: *provided*, however that notice shall be given to the Council, within seventy-two hours from the onset of needed repairs.

(7) Maintenance and repair of drainage and sewer facilities constructed in accordance with federal or state laws and normal maintenance and repair of any utility or railroad.

(8) Normal maintenance or repair to any pier or walkway provided that such maintenance or repair not involve dredge or fill.

(9) Construction or maintenance of a major utility facility where the utility has

obtained a certificate for such facility under. "The Utility Facility Siting and Environmental Protection Act", Chapter 33 of Title 58 of the 1976 Code. *Provided*, however, that the South Carolina Public Service Commission shall make the Council a party to certification proceedings for utility facilities within the coastal zone.

HISTORY: 1977 Act No. 123 § 13; 1982 Act No. 410, § 1.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

CASE NOTES

South Carolina State Parts Authority had legally commenced use and was entitled to exemption from requirement that it obtain permit from South Carolina Coastal Council for Wando River Project, where port authority had received state permits from Budget and Control Board within time specified in § 48-39-130(c), even though project had not yet broken ground. South Carolina State Ports Authority v South Carolina Coastal Council, 270 SC 320, 242 SE2d 225 (1978).

§ 48-39-140. Submission of development plans; application for permits.

(A) Any person who wishes may submit development plans to the Council for preliminary review. If a

permit is necessary, the Council will make every effort to assist the application in expediting the permit application.

(B) Each application for a permit shall be filed with the Council and shall include:

(1) Name and address of the applicant.

(2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.

(3) A plat of the area in which the proposed work will take place.

(4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

(5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

(C) The Council within thirty days of receipt of an application for a permit shall notify, in writing, interested agencies, all adjoining landowners, local government units in which the land is located and other interested persons of the application and shall indicate the nature of the applicant's proposal. Public notice shall be given at least once by advertisement in state and local newspapers of general circulation in the area concerned. The Council may hold a public hearing on applications which have any effect on a critical area if it deems a hearing necessary. The public hearing shall be held in the county where the land is located and if in more than one county the

Council shall determine in which county to hold the hearing or may hold hearings in both counties.

Provided, all interested agencies, all adjoining landowners, local government units and other interested persons shall have thirty days to file a written comment to such application after receipt of any such notice by the Council.

HISTORY: 1977 Act No. 123 § 14.

§ 48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

(A) The South Carolina Coastal Council may charge an administrative fee upon application for a permit for alteration of any critical area as defined in § 48-39-10. Applications for permits which are noncommercial/non-industrial in nature and provide personal benefits that have no connection with a commercial/industrial enterprise shall be charged an administrative fee not to exceed fifty dollars. A reasonable fee, determined by the South Carolina Coastal Council, will be charged for permit applications when the planned or ultimate purpose of the activity is commercial or industrial in nature.

(B) Any fees collected under this provision shall be forwarded to the State Treasurer for credit to the general fund.

HISTORY: 1982 Act No. 466 Part II § 19.

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct and natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and

submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When

applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. *Provided*, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

HISTORY: 1977 Act No. 123 § 15, 1982 Act No. 410. § 2.

§ 48-39-160. Violations jurisdiction of courts.

The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the Council, the Attorney General or any person adversely affected in the event the affected critical area lies in more than one county, jurisdiction shall be in the circuit court of any county in which any part of the area lies. In the same action the circuit court having jurisdiction over the affected area may require such area to be restored to its original condition, if possible, and environmentally desirable. In the alternative, the Council may complete the restoration at the expense of the person altering the area in which case suit for recovery of the amount so expended may be brought in any court having jurisdiction to restrain a violation. No bond shall be required as a condition of the granting of a temporary restraining order under this section, except that the court may in its discretion require that a reasonable bond be posted by any person requesting the court to restrain a violation of this chapter.

HISTORY: 1977 Act No. 123 § 16.

§ 48-39-170. Penalties.

(A) Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by imprisonment of nor more than six months or by a fine or not more than five thousand dollars, or both, for the first offense, and by imprisonment of not more than one year, or by a fine or

not more than ten thousand dollars, or both, for each subsequent offense.

(B) Any violation of any provision of this chapter involving five yards square (225 square feet) or less of critical area may be treated as a minor violation, the penalty for which shall be a fine of not less than fifty dollars nor more than two hundred dollars. The conservation officers of the South Carolina Wildlife and Marine Resources Department may serve warrants under this provision and otherwise enforce this chapter. The magistrates of this State have jurisdiction over minor violations of this chapter. Each day of noncompliance with any order issued relative to a minor violation or noncompliance with any permit, regulation, standard, or requirement relative to a minor violation shall constitute a separate offense; *provided*, however, that violations which involve the construction or repair of water control structures shall not be considered minor violations regardless of the area involved.

(C) Any person who is determined to be in violation of any provision of this chapter by the Coastal Council shall be liable for, and may be assessed by the Council for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the Council determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the Council may issue an order requiring such person to comply with such permit, regulation, standard or requirement, including an order requiring restoration when deemed environmentally appropriate by the Council; in addition, the Council may bring a civil enforcement action under this section as well

as seeking an appropriate injunctive relief under § 48-39-160.

(D) All penalties assessed and collected pursuant to this section shall be deposited in the general fund of the State.

HISTORY: 1977 Act No. 123 § 17; 1982 Act No. 410, § 3.

§ 48-39-180. Judicial review of permit determinations.

Any applicant whose permit application has been denied, revoked, suspended or approved subject to conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for a review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land. The use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken. The circuit court may in its discretion require that a reasonable bond be posted by any person. It is specifically intended that any person whose permit application has been denied may have such permit issued by the

circuit court having jurisdiction if such person can prove the reasons given for denial to be invalid.

HISTORY: 1977 Act No. 123 § 18.

Cross references –

As to appeals to Circuit and County Courts in certain cases, see Chapter 7 of Title 18.

§ 48-39-190. Lands not affected by chapter.

Nothing in this chapter shall affect the status of the title of the State or any person to any land below the mean highwater mark. The State shall in no way be liable for any damages as a result of the erection of permitted works.

HISTORY: 1977 Act No. 123 § 19.

§ 48-39-200. Restrictions of Council's regulatory authority.

Notwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over any area outside the critical areas in the coastal zone.

HISTORY: 1977 Act No. 123 § 20.

§ 48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Ninety days after July 1, 1977, the Council shall be the only state agency with authority to permit or deny any alteration or utilization within the critical area except

for the exemptions granted under § 48-39-130(D) and such application for a permit shall be acted upon within the time prescribed by this chapter.

HISTORY: 1977 Act No. 123 § 21.

§ 48-39-220. Legal action to determine interest in tidelands.

(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal Zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the secretary of the State Budget and Control Board.

(B) Any party may demand a trial by jury in any such action by serving upon the other party(s), a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this action.

(D) The Attorney General shall immediately notify the Council upon receipt of any private suit made under

this section, his response to that suit, and the final disposition of the suit. The Council will publish all such notifications in the state register.

HISTORY: 1977 Act No. 123 § 22.

Cross references –

As to suits involving state, state agencies and officials and United States, see Chapter 77 of Title 15.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977. 29 SC L Rev 666.

CHAPTER 39

Coastal Tidelands and Wetlands

New Sections Added

SEC.

48-39-250. Legislative findings regarding the coastal beach/dune system.

48-39-260. Policy statement.

48-39-270. Definitions.

48-39-280. Forty-year retreat policy.

48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

48-39-300. Local governments given authority to exempt certain erosion control structures from restrictions.

48-39-305. Judicial determination of ownership and whether construction prohibition applies or requires compensation; burden of proof.

48-39-310. Prohibition of destruction of any beach or dune vegetation seaward of setback line.

48-39-320. Comprehensive beach management plan.

48-39-330. Disclosure statement.

48-39-340. Distribution of funding.

48-39-350. Local comprehensive beach management plan.

48-39-355. Documentation of authorized activity.

48-39-360. Application of chapter.

§ 48-39-10. Definitions.

As used in this chapter:

[See parent volume for items (A)-(I)]

(J) "Critical area" means any of the following:

(1) coastal waters;

(2) tidelands;

(3) beaches;

(4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

[See parent volume for remainder of text]

HISTORY: 1988 Act No. 634, § 4, eff July 1, 1988.

Effect of Amendment –

The 1988 amendment in item (J) rewrote subitem (4).

§ 48-39-30. Legislative declaration of state policy.

CASE NOTES

Evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest necessary for certification of residential development and dredging. South Carolina Wildlife Federation v. South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is created the South Carolina Coastal Council which consists of eighteen members as follows: eight members, one from each coastal zone county, to be elected by a majority vote of the members of the House of Representatives and a majority vote of the Senate members representing the county from three nominees submitted by the governing body of each coastal zone county, each House or Senate members to have one vote: six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in that district, each House or Senate member to have one vote; and the following legislative members who serve ex officio: two state senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game and Forestry

Committee; and two members of the House of Representatives to be appointed by the Speaker of the House. The council shall elect a chairman, vice-chairman, and other officers it considers necessary.

(B) Terms of legislative members are coterminous with their terms as members of the General Assembly. Terms of all nonlegislative members are for four years and until successors are appointed and qualify. Members from congressional districts serve terms of two years only as determined by lot at the first meeting of the council. Vacancies must be filled in the original manner of selection for the remainder of the unexpired term.

HISTORY: 1990 Act No. 607, § 6, eff June 25, 1990.

Editor's Note –

Section 7 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The current nonlegislative members of the South Carolina Coastal Council representing the eight coastal zone counties serve until their present terms of office expire at which time their successors elected in the manner provided in Section 48-39-40 of the 1976 Code, as amended by this act, take office."

Effect of Amendment –

The 1990 amendment, in subsection (A), provided for election of council members from coastal counties by members of the legislature from the county rather than by the county governing body; and in subsection (B), changed the term of non-legislative council members

from four to two years and deleted provisions governing the terms of members appointed when the council was initially formed.

CASE NOTES

Non-profit public interest organizations "devoted to the promotion of good government and the wise use and conservation of natural resources" whose members "use and enjoy the natural resources of the coastal zone of South Carolina which are affected by decisions of the South Carolina Coastal Council" did not have standing to challenge the constitutionality of § 48-39-40 insofar as it provides that 4 legislators serve ex officio on the 18-member South Carolina Coastal Council where the organizations alleged no individualized injury. Energy Research Foundation v. Waddell (1988) 295 SC 100, 367 SE2d 419.

§ 48-39-50. Powers and duties of Council.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by

Act 634 of 1988, and in existence before the effective date of this act."

CASE NOTES

Coastal Council's grant of permit to landowner to impound 660 acres of marshland which would result in the blockage of navigable streams was reversed, since a principal purpose of the impoundment would not be to give effect to any overriding public interest, but, rather, to allow the permitted to engage in a commercial venture of building duck blinds for annual leasing. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

The substantial evidence standard were for judicial review as stated in § 1-23-380 is a proper standard for review of actions by the Coastal Council and, the court will not substitute its judgment for that of the agency unless the agency's determination is affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

The Coastal Council does not have the authority to authorize the complete blockage of navigable streams and waterways, especially in the case where there is no overriding public interest. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

ATTORNEY GENERAL'S OPINIONS

The Coastal Council is the sole state agency to issue permits for certain activities such as construction or

excavation in critical areas of this State's navigable, tidal waters. The Coastal Council would not have jurisdiction over permits previously issued by the Budget and Control Board which were in effect during the time when the Coastal Zone Management Act became effective. 1988 Op Atty Gen, No. 88-44, p. 133.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-80. Development of coastal management program.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

CASE NOTES

Evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest necessary for certification of residential development and dredging. South Carolina Wildlife Federation v South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

Environmental groups and the league of women voters had standing to maintain an action to challenge a certification for a residential development involving dredging a channel through freshwater wetlands where the groups alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands. South Carolina Wildlife Federation v South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

§ 48-39-90. Public hearings on management plan.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-100. Plan developed in cooperation with local governments.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this Act."

§ 48-39-110. Submission of plan by State Ports Authority.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Cross references –

The provisions of this section are not affected or modified by provisions concerning the damage, repair, or replacement of erosion control devices, see § 48-39-290.

§ 48-39-130. Permits required to utilize critical areas.

[See parent volume for subsections (A)-(C)]

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of an appointed official of a county or municipality or of the State, acting to protect the public health and safety, upon notification to the council. However, with regard to the beach/dune critical area, only the use of sandbags, sandscraping, or renourishment, or a combination of them, in accordance with guidelines provided by the council is allowed pursuant to this item.

[See parent volume for items (2)-(5)]

(6) Emergency repairs to an existing bank, dike, fishing pier, or structure, other than oceanfront erosion control structures or devices, which has been erected in accordance with federal and state laws or provided for by general law or acts passed by the General Assembly, if notice is given in writing to the council within seventy-two hours from the onset of the needed repairs.

[See parent volume for remainder of text]

HISTORY: 1988 Act No. 634, § 5, eff July 1, 1988; 1990 Act No. 607, § 2, eff June 25, 1990.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1988** amendment in item (1) of subsection (D) added the last sentence relating to sandbags and sandscraping, and in item (6) of subsection (D) deleted a reference to fishing piers.

The **1990** amendment revised subsection (D), items (1) and (6) by adding renourishment as an option in item (1), and adding a reference to structures other than oceanfront erosion control structures or devices in item (6).

CASE NOTES

Coastal Council's grant of permit to landowner to impound 660 acres of marshland which would result in the blockage of navigable streams was reversed, since a principal purpose of the impoundment would not be to give effect to any overriding public interest, but, rather, to allow the permittee to engage in a commercial venture

of building duck blinds for annual leasing. State ex rel. Medlock v. South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

§ 48-39-140. Submission of development plans; application for permits.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-150. Approval or denial of permits; appeal to Council.

Editor's Note –

Section 8 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Cross references –

Appeal of denial of special permit to build or rebuild a structure other than an erosion control structure seaward of the baseline is to be made pursuant to procedures in this section, see § 48-39-290.

§ 48-39-160. Violations; jurisdiction of courts.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-170. Penalties.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-180. Judicial review of permit determinations.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-190. Lands not affected by chapter.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-200. Restriction of Council's regulatory authority.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-220. Legal action to determine interest in tidelands.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-250. Legislative findings regarding the coastal beach/dune system.

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to

the people of this State and serves the following functions:

(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine-species;

(d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39 of title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system.

Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This

space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also may deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach Management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

HISTORY: 1990 Act No. 607, § 1, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-260. Policy statement.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;

(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the South Carolina Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

HISTORY: 1990 Act No. 607, § 1, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches

equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-270. Definitions.

As used in this chapter:

(1) Erosion control structures or devices include:

(a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;

(b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;

(c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

(2) Habitable structure means a structure suitable for human habitation including, but not limited to, single or multifamily residences, hotels, condominium buildings, and buildings for commercial purposes. Each building of a condominium regime is considered a separate habitable structure but, if a building is divided into apartments, then the entire building, not the individual apartment, is considered a single habitable structure. Additionally, a habitable structure includes porches, gazebos, and other attached improvements.

(3) Council means the South Carolina Coastal Council.

(4) Beach nourishment means the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide.

(5) The beach/dune system includes all land from the mean highwater mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280.

(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced

directly by tidal inlets or associated inlet shoals.

(7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

(8) Master plan means a document or a map prepared by a developer or a city as a policy guide to decisions about the physical development of the project or community.

(9) Planned development means a development-plan which has received local approval for a specified number of dwelling and other units. The siting and size of structures and amenities are specified or restricted within the approval. This term specifically references multifamily or commercial projects not otherwise referenced by the terms, master plan, or planned unit development.

(10) Planned unit development means a residential, commercial, or industrial development, or all three, designed as a unit and approved by local government.

(11) Destroyed beyond repair means that more than sixty-six and two-thirds percent of the replacement value of the habitable structure or pool has been destroyed. If the owner disagrees with the appraisal of the council, he may obtain an appraisal to evaluate the damage to the building or pool. If the appraisals differ, then the two appraisers must select a third appraiser. If the two appraisers are unable to select a

third appraiser, the clerk of court of the county where the structure lies must make the selection. Nothing in this section prevents a court of competent jurisdiction from reviewing, de novo, the appraisal upon the petition of the property owner.

(12) Pool is a structure designed and used for swimming and wading.

(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, which ever first occurs, measured from the ocean.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Sections 1 and 2 of Act 634 of 1988 are repealed pursuant to 1990 Act No. 607, § 4, eff June 25, 1990.

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on

the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-280. Forty-year retreat policy.

(A) A forty-year policy of retreat from the shoreline is established. The council must implement this policy and must utilize the best available scientific and historical data in the implementation. The council must establish a baseline which parallels the shoreline for each standard erosion zone and each inlet erosion zone.

(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other manmade alterations, the baseline must be established by the council using the best scientific and historical data, as where the crest of the primary oceanfront sand dunes for that zone would be located if the shoreline had not been altered.

(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the council as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the council, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors must consider

historical inlet migration, inlet stability,channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dunes of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.

(4) Notwithstanding any other provision of this section, where a council-approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition the council to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the council in accordance with Section 48-39-280(A)(1) by showing that the beach has been stabilized by council-approved beach nourishment.

If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future.

If the council grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after the initial beach nourishment project has been completed as determined by the council.

If the beach nourishment fails to stabilize the beach after a reasonable period of time, the council must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach.

(B) To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the council as a part of the State Comprehensive Beach Management Plan.

(C) The council, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1988, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision. In the establishment and revision of the baseline and setback line, the council must transmit and otherwise make readily available to the public all information upon which

its decisions are based for the establishment of the final baseline and setback line. The council must hold one public hearing before establishing the final baseline and setback lines. Until the council establishes new baselines and setback lines, the existing baselines and setback lines must be used. The council may stagger the revision of the baselines and setback lines of the erosion zones so long as every zone is revised in accordance with the time guidelines established in this section.

(D) In order to locate the baseline and the setback line, the council must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The council must acquire sufficient surveyed topographical information on which to locate the baseline. Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the council, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate. In cases where no primary oceanfront sand dunes exist, a study conducted by the council is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered. The council, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on

the coastline which would preclude significant development, or both.

(E) A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the appropriate committee of the council and handled in accordance with the council's regulations on appeals.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location

acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1990** amendment rewrote this section.

Cross references –

As to definitions, see § 48-39-270.

As to the definition of "critical area", see § 48-39-280(j).

§ 48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

(A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty-four square feet;

(3) fishing piers which are open to the public. Those fishing piers with their associated structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) gold courses;

(5) normal landscaping;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device.

A permit must be obtained from the council for items (2) through (7).

(B) construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the council that the construction meets the following requirements:

(i) the habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the council showing a footprint of the structure on the property, a cross section of the structure, and the structure's relation to property lines and setback lines which may be in effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the council.

(ii) Additions to habitable structures are allowed if the additions together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a).

(iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed.

(iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the council that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback line. The linear footage of

the replaced structure parallel to the coast does not exceed the original linear footage parallel to the coast.

b. the replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. the reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48-39-250 through 48-39-360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possible, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.

(b) Erosion control structures or devices which existed on the effective date of this act must not be required or replaced if destroyed:

(i) more than eighty percent above grade through June 30, 1995;

(ii) more than sixty-six and two-thirds percent above grade from July 1, 1995, through June 30, 2005;

(iii) More than fifty percent above grade after June 30, 2005.

(iv) Damage to seawalls and bulkheads must be judged on the percent of the structure remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or device standing, cracked or broken piles, whalers, and panels must be assessed on

an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the council, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on

a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired.

(c) Erosion control structures or devices determined to be destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner's expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) the provisions of this section do not affect or modify the provisions of Section 48-39-120(C).

(3) Pools, as defined in Section 48-39-270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is build landward of an erosion control structure or device which was in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the council.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the council pursuant to Section 48-39-270(11), it may be replaced if the owner certifies in writing to the council that:

(i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements.

(ii) It is rebuilt no larger than the destroyed pool.

(iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the council pursuant to Section 48-39-270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to sub-subitem (iii) to subitem (c).

(4) All other construction or alteration between the baseline and the setback line requires a council permit. However, the council, in its

discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of sections 48-39-250 through 48-39-360.

(C)(1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48-39-280 may proceed with construction pursuant to a valid building permit issued as of the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidence by at least one of the following:

(a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the completion of the utility and infrastructure installation designed to service the real property that is subject to the

setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the council.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the council may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the council orders the removal. However, the use of the property authorized under this provision, in the determination of the council, must not be detrimental to the public health, safety, or welfare.

(2) The council's Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360.

(4) A party aggrieved by the committee's decision to grant or deny a special permit application may appeal to the full council pursuant to Section 48-39-150(D).

(E) The provisions of this section and Section 48-39-280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds.

The baseline determined by the local governing body and the council is the line of erosion control devices and structures and the council retains its jurisdiction seaward of the baseline. In addition, upon completion of a council approved beach renourishment project, including the completion of a sand transfer system if necessary for long-term stabilization, an area under a Section 111 Study becomes subject to all the provisions of this chapter.

For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration project is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one-half miles, with a project design capable of withstanding a one-in-ten-year storm, as determined by council, and renourishment is conducted annually at a rate, agreed upon by the council and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the council must obtain the opinion of an independent third party.

Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.

HISTORY: 1988 Act No. 634, § 1, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their

resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1990** amendment rewrote this section.

§ 48-39-300. Local governments given authority to exempt certain erosion control structures from restrictions.

A local governing body, if it notifies the council before July 1, 1990, may exempt from the provisions of Section 48-39-290, relating to reconstruction and removal of erosion control devices, the shorelines fronting the Atlantic Ocean under its jurisdiction where coastal erosion has been shown to be attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the Rivers and Harbors Act of 1968, as amended by the Water Resources Development Act of 1986 and approved by the United States Army Corps of Engineers. Erosion control devices exempt under this section must not be constructed seaward of their existing location, increased in dimension, or rebuilt out of materials different from that of the original structure.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-305. Judicial determination of ownership and whether construction prohibition applies or requires compensation; burden of proof.

(A) A person having a recorded interest or interest by operation of law in or having registered claim to land seaward of the baseline or setback line which is affected by the prohibition of construction or reconstruction may petition the circuit court to determine whether the petitioner is the owner of the land or has an interest in it. If he is adjudged the owner of the land or to have an interest in it, the court shall determine whether the prohibition so restricts the use of the property as to deprive the owner of the practical uses of it and is an unreasonable exercise of police power and constitutes a taking without compensation. The burden of proof is on the petitioner as

to ownership, and the burden of proof is on the State to prove that the prohibition is not an unreasonable exercise of police power.

(B) The method provided in this section for the determination of the issue of whether the prohibition of the issue, and it must not be determined in another judicial proceeding. The court shall enter a judgment in accordance with the issues. If the judgment is in favor of the petitioner, the order must require the State either to issue the necessary permits for construction or reconstruction of a structure, order that the prohibition does not apply to the property, or provide reasonable compensation for the loss of the use of the land or the payment of costs and reasonable attorney's fees, or both. Either party may appeal the court's decision.

HISTORY: 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-310. Prohibition of destruction of any beach or dune vegetation seaward of setback line.

The destruction of beach or dune vegetation seaward of the setback line is prohibited unless there is no feasible

alternative. When there is destruction of vegetation permitted seaward of the setback line, mitigation, in the form of planting of new vegetation where possible, for the destruction is required as part of the permit conditions.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar-areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches

equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

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"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-320. Comprehensive beach management plan.

(A) The council's responsibilities include the recreation of long-range and comprehensive beach management plan for the Atlantic Ocean shoreline in South Carolina. The plan must include all of the following:

(1) development of the data base for the state's coastal areas to provide essential information necessary to make informed and scientifically based decisions concerning the

maintenance or enhancement of the beach/dune system;

(2) development of guidelines and their coordination with appropriate agencies and local governments for the accomplishment of:

(a) beach/dune restoration and nourishment, including the projected impact on coastal erosion rates, cost/benefit of the project, impact on flora and fauna, and funding alternatives;

(b) development of a beach access program to preserve the existing public access and enhance public access to assure full enjoyment of the beach by all residents of this State;

(c) maintenance of a dry sand and ecologically stable beach;

(d) protection of all sand dunes seaward of the setback line;

(e) protection of endangered species, threatened species, and important habitats such as nesting grounds;

(f) regulation of vehicular traffic upon the beaches and the beach/dune system which includes the prohibition of vehicles upon public beaches for nonessential uses;

(g) development of a mitigation policy for construction allowed seaward of the setback line, which must include public access ways, nourishment, vegetation, and other appropriate means;

(3) formulation of recommendations for funding programs which may achieve the goals set forth in the State Comprehensive Beach Management Plan;

(4) development of a program on public education and awareness of the importance of the beach/dune system, the project to be coordinated with the South Carolina Educational Television Network and Department of Parks, Recreation and Tourism;

(5) assistance to local-governments in developing the local comprehensive beach management plans.

(B) The plan provided for in this section is to be used for planning purposes only and must not be used by the council to exercise regulatory authority not otherwise granted in this chapter, unless the plan is created and adopted pursuant to Chapter 23 of Title 1.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of the 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quality of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event of events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-330. Disclosure statement.

Thirty days after the initial adoption by the council of setback lines, a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plan Coordinate System (N.A.D. – 1983) and include the local erosion rate most recently made available by the council for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.

The provisions of this section are regulatory in nature and do not affect the legality of an instrument violating the provisions.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

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act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-340. Distribution of funding.

Funding for local governments to provide for beachfront management must be distributed in a fair and equitable manner. Consideration must be given to the size of the locality, the need for beach management in the area, the cost/benefits of expenditures in that area, and the best interest of the beach/dune system of the State as established by priority by the council.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

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an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

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Effect of Amendment –

The 1990 amendment made minor grammatical changes in this section.

§ 48-39-350. Local comprehensive beach management plan.

(A) The local governments must prepare by July 1, 1991, in coordination with the council, a local comprehensive beach management plan which must be submitted for approval to the council. The local comprehensive beach management plan, at a minimum, must contain all of the following:

(1) an inventory of beach profile data and historic erosion rate data provided by the council for each standard erosion zone and inlet erosion zone under the local jurisdiction;

(2) an inventory of public beach access and attendant parking along with a plan for enhancing public access and parking;

(3) an inventory of all structures located in the area seaward of the setback line;

(4) an inventory of turtle nesting and important habitats of the beach/dune system and a protection and restoration plan if necessary;

(5) a conventional zoning and land use plan consistent with the purposes of this chapter for the area seaward of the setback line;

(6) an analysis of beach erosion control alternatives, including renourishment for the beach under the local government's jurisdiction;

(7) a drainage plan for the area seaward of the setback zone;

(8) a post disaster plan including plans for cleanup, maintaining essential services, protecting public health, emergency building ordinances, and the establishment of priorities, all of which must be consistent with this chapter;

(9) a detailed strategy for achieving the goals of this chapter by the end of the forty-year retreat period. Consideration must be given to relocating buildings, removal of erosion control structures, and relocation of utilities;

(10) a detailed strategy for achieving the goals of preservation of existing public access and the enhancement of public access to assure full enjoyment of the beach by all residents of this State.

The plan must be updated at least every five years in coordination with the council following its approval. The local governments and the council must implement the plan by July 1, 1992.

(B) Notwithstanding the provisions of Section 48-39-340, if a local government fails to act in a timely manner to establish and enforce a local coastal beach management plan, the council must impose and implement the plan or the State Comprehensive Beach Management Plan for the local government. If a local government fails to establish and enforce a local coastal beach management plan, the government automatically loses its eligibility to receive available state-generated or shared revenues designated for beach/dune system protection, preservation, restoration, or enhancement, except as

directly applied by the council in its administrative capacities.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

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(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established

by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

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Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-355. Documentation of authorized activity.

A permit is not required for an activity specifically authorized in this chapter. However, the council may require documentation before the activity begins from a person wishing to undertake an authorized construction or reconstruction activity. The documentation must provide that the construction or reconstruction is in compliance with the terms of the exemptions or exceptions provided in Sections 48-39-280 through 48-39-360.

HISTORY: 1990 Act No. 607 § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

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§ 48-39-360. Application of chapter.

The provisions of Sections 48-39-250 through 48-39-355 do not apply to an area which is at least one-half mile inland from the mouth of an inlet.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

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Effect of Amendment –

The 1990 amendment substituted "Sections 48-39-250 through 48-39-360" for "this chapter".

APPENDIX E

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON David H. Lucas, Plaintiff, -vs- South Carolina Coastal Council, an agency of the State of South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS C/A No. 88-CP-10- COMPLAINT

The plaintiff above named, complaining of the defendant, alleges:

1. The plaintiff is a citizen and resident of the State of South Carolina and is the owner of real property located on the Isle of Palms in Charleston County, South Carolina, said property consisting of two ocean-front lots which are more particularly described in Exhibits "A" and "B" attached hereto.

2. The defendant, South Carolina Coastal Council, is an agency and instrumentality of the State of South Carolina, created by Act 123 of the 1977 South Carolina General Assembly, and exercises regulatory authority and power over both public and private lands and waters in the coastal zone of the State of South Carolina pursuant to the powers granted to it by the South Carolina General Assembly.

3. On June 8, 1988 the Governor of the State of South Carolina signed into law Act 634 of the 1988 General Assembly commonly known as the "Beachfront Management Act," which act amends Act 123 of 1977 and seeks to impose restrictions on future development of ocean-front property, such as the property of the plaintiff, by way of imposing statutorily mandated "setback" lines not previously required by law.

4. Pursuant to Act 634 of 1988, the defendant has established "setback lines" and has published data and methodologies to determine the precise location of these "setback lines" on individual parcels of privately-owned property.

5. The plaintiff, relying on the information data and methodologies supplied by the defendant, has located the "setback lines" upon his property that is the subject of this action. The set back lines transverse both lots in close proximity to "Beachwood East Road" so that the vast majority of both lots lie [sic] seaward of the statutorily-imposed setback lines.

6. The location of the "setback lines" on plaintiff's property, due to the development and building restrictions imposed by Act 634 of 1988 as well as the "administrative interpretations" adopted by the defendant, prohibit any kind of development, building or construction on plaintiff's property. Resultingly, plaintiff has been denied all reasonable use of his property, has been denied all reasonable investment-backed expectations otherwise enuring to the plaintiff by his ownership of this property, has been deprived of all incidence of private ownership of this property, has been denied the unrestricted right of

use, enjoyment and disposal of the property, and the property has been rendered valueless by the action of the defendant, all to the damage of the plaintiff.

7. In South Carolina the "public beach" or area of beach subject to unrestricted public use, extends only from the mean high water mark to the mean low water mark of the Atlantic Ocean. Plaintiff's property lies entirely above and some distance inland from the mean high water mark of the Atlantic Ocean.

8. Upon information and belief, prior to the passage of Act 634 and the imposition of "setback lines" on plaintiff's property, the plaintiff's property had a market value in excess of $2,000,000; upon information and belief, because of the location of the "setback lines" on plaintiff's property and the restriction on development imposed by the defendant pursuant to Act 634, the plaintiff's property has no market or other economic value.

9. The restrictions imposed on plaintiff's property by the defendant are arbitrary and capricious and have affected a taking of the plaintiff's property for the purpose of benefiting the public of the state of South Carolina without the payment of just compensation.

10. The stated purpose of Act 634 of 1988 is to protect the public beach from erosion and the harmful effects of erosion-control devices such as bulkheads, riprap and seawalls. The plaintiff's property, however, is in its entirety landward of the "public beach", has no erosion-control devices on or in front of it, and is presently suitable in its natural state for residential development.

11. The defendant's restriction on the use and enjoyment of the plaintiff's property has affected a taking of plaintiff's property without the payment of just compensation in violation of Article I, Section 13 of the South Carolina Constitution and Amendment V of the United States Constitution.

12. The defendants action in requiring plaintiff to leave his property in an undeveloped state thus depriving plaintiff of the use and enjoyment of his property simply because the property is located on the ocean front, denies the plaintiff the equal protection of the laws guaranteed under the United States Constitution and the Constitution of the State of South Carolina.

WHEREFORE, the plaintiff demands that the defendant pay to him just compensation for the unlawful and unconstitutional taking of his property in an amount to be determined by the trier of facts; that the defendant pay to the plaintiff damages for the temporary taking of his property from June 8, 1988 until such time as this matter is finally resolved; that the defendant pay to the plaintiff attorneys' fees, expert witness fees and costs reasonably associated with bringing this action, and that the court award such other and further relief as it may deem just and reasonable.

/s/ Gedney M. Howe, III
Gedney M. Howe, III
P.O. Box 1440
Charleston, SC 29402

/s/ Ellison D. Smith, IV
Ellison D. Smith, IV

SMITH & BUNDY
P.O. Box 579
Charleston, SC 29402

Charleston, South Carolina

January 5, 1989

APPENDIX F

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN V. ESPOSITO, et al.

Plaintiff-Appellant,

v.

THE SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency; JOHN C. HAYES, III, Chairman of the South Carolina Coastal Council; H. WAYNE BEAM, Executive Director of the South Carolina Coastal Council,

Defendants-Appellees.

No. 89-1840

NATURAL RESOURCES DEFENSE COUNCIL; SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,

Amici Curiae.

BARNEY L. CHAVOUS; ODESSA K. CHAVOUS,

Plaintiffs-Appellees,

v.

THE SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency,

Defendant-Appellant,

and

JOHN C. HAYES, III, Chairman of the South Carolina Coastal Council; H. WAYNE BEAM, Executive Director of the South Carolina Coastal Council,

Defendants.

No. 90-2367

NATURAL RESOURCES DEFENSE COUNCIL; SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,

Amici Curiae.

Appeals from the United States District Court for the district of
South Carolina, at Beaufort.
Falcon B. Hawkins, Chief District Judge.
(CA-88-2055-D-1, CA-89-216-D-1)

Argued: July 18, 1990

Decided: July 3, 1991

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Affirmed in part and vacated and remanded in part by published opinion. Judge Widener wrote the majority opinion, in which Judge Russell joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Nancy B. Tecklenburg, C. C. Harness, III, SOUTH CAROLINA COASTAL COUNCIL, Charleston, South Carolina, for Appellants. John V. Esposito, Randall M. Chastain, Hilton Head Island, South Carolina, for Appellees. **ON BRIEF:** William L. Want, SOUTH CAROLINA COASTAL COUNCIL, Charleston, South Carolina, for Appellants. Robertson H. Wendt, Jr., HOLLINGS & NETTLES, P.A., Charleston, South Carolina; Nina M. Sankovitch, NATURAL RESOURCES DEFENSE COUNCIL, New York, for Amici Curiae.

OPINION

WIDENER, Circuit Judge:

These consolidated cases deal with challenges to the judgment of the district court concerning claims that the defendants violated the fifth and fourteenth amendments of the United States Constitution. The district court in *Esposito*, No. 89-1140, rejected the plaintiffs' claim that South Carolina's Beachfront Management Act (Act) violated the due process and takings clauses of the fifth and

fourteenth amendments. In *Chavous*, however, No. 90-2367, the district court entered judgment for the plaintiffs on their claim that the Act violated the takings clause and enjoined its enforcement. We affirm the district court's judgment in *Esposito*, and vacate on account of mootness its judgment in *Chavous*.

I.

In 1988, the General Assembly of South Carolina enacted the Beachfront Management Act, which amended certain sections of Title 48, Chapter 39 of the Code of Laws of South Carolina. This legislation recited the Assembly's finding that "[m]any miles of South Carolina's beaches have been identified as critically eroding." 1988 Act No. 634, § 1. The Assembly noted that the beach/dune system along the coast served as a storm barrier protecting lives and property, generated a substantial portion of the State's tourism revenues, provided a habitat for species of plants and animals, and offered a natural, healthy environment enhancing the well-being of the State's citizens. 1988 Act No. 634, § 1(a)-(d). The legislation further stated that the beach/dune system had been threatened by the presence of unwise development "too close" to the beaches and by the use of certain hard erosion control devices that had actually increased the vulnerability of beachfront property to damage. 1988 Act No. 634, § 1. The Assembly accordingly approved a "comprehensive, long-range beach management plan" entailing "a gradual retreat from the system over a forty-year period." 1988 Act No. 634, § 2.

Among the numerous specific provisions enacted to effectuate this plan, we need discuss only those implicated by the present actions. The plaintiffs' claims arose through the operation of the statutory requirement that the defendant, South Carolina Coastal Council, establish certain lines in each county fronting the Atlantic Ocean, S.C. Code Ann. § 48-39-280(D) (Supp. 1989). The first of these lines was the "baseline." As applied to the property involved in these actions, the Act required that this line be drawn at "the location of the crest of an ideal primary oceanfront sand dune" or, in areas where the shoreline had been altered by the construction of erosion control or other manmade devices, "where the crest of an ideal primary oceanfront sand dune . . . would be located if the shoreline had not been altered." S.C. Code Ann. § 48-39-280(A)(1) (Supp. 1989). The Act next directed that a "setback line" be calculated. In order to implement the statute's stated policy of retreat, this line was established "landward of the baseline . . . at a distance which is forty times the average annual erosion rate," but "no less than twenty feet from the baseline." S.C. Code Ann. § 48-39-280(B)(1) (Supp. 1989). The Assembly provided that these requirements be implemented by "utilizing the best available information and data" and set out specific procedures to be followed by the South Carolina Coastal Council in establishing the various lines. S.C. Code Ann. § 48-39-280(A) (Supp. 1989).

The plaintiffs in both *Esposito* and *Chavous* are owners of real property located in the Town of Hilton Head, Beaufort County, South Carolina. The lots of the *Esposito* plaintiffs have been improved with residential dwellings. In terms of the provisions of the Act, most of

these dwellings were situated at least partially seaward of the baseline or within what the plaintiffs call the "dead zone," an area extending twenty feet landward of the baseline. The Act stated that any habitable structure "destroyed beyond repair" by natural causes or fire could not be rebuilt seaward of the baseline or within the dead zone. S.C. Code Ann. § 48-39-290(B) (Supp. 1989).[1] An administrative interpretation defined "destroyed beyond repair" to mean that "more than two thirds (66 2/3%) of the building components making up the structure are damaged to such a degree that replacement is required in order for the structure to be habitable, functional or sound." The Act also regulated attempts to make additions to existing structures and install recreational amenities. S.C. Code Ann. § 48-39-290(B) (Supp. 1989). The plaintiffs claimed that by virtue of these restrictions, especially the prohibition on the reconstruction of their dwellings in the case of destruction beyond repair, South Carolina had unlawfully taken their private property

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[1] We note that there appears to be a conflict between certain provisions of § 48-39-290 (Supp. 1989). Section (B) initially states that habitable structures destroyed beyond repair may be reconstructed "seaward of the setback line," provided that certain requirements are met. The statute later states, however, after section (B)(8), that "[n]othing in this section allows any rebuilding in the area from the baseline to twenty feet landward of the baseline." While the parties appear to agree that the latter provision controls, we express no opinion concerning which provision should be construed to govern activity in the area extending twenty feet to landward from the baseline. Rather, we will apply the more restrictive interpretation for purposes of reviewing the plaintiffs' claim that the statutory restrictions rise to the level of a taking.

without just compensation and violated the due process clause.

The *Chavous* plaintiffs, on the other hand, own a vacant lot with no improvements. Under the statutory scheme, approximately ninety percent of their lot was situated seaward of the baseline or within the dead zone. The Act stated that no part of a new habitable structure could be constructed seaward of the baseline or in the dead zone. S.C. Code Ann. § 48-39-300 (Supp. 1989). The plaintiffs claimed that this prohibition of construction amounted to an unlawful taking of their private property without compensation and a violation of due process.

Before considering the substance of these claims, we should take into account the effect of recent amendments to the Act upon our review.[2] The plaintiffs' claims and the district court's judgments involved, of course, only the effects of the provisions of the 1988 version of the statute.

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[2] In 1990, the General Assembly returned to the Act and made several significant changes in the statutory scheme discussed above. The 1990 Act eliminated the dead zone so that activity in the area twenty feet landward of the baseline is now governed by the less restrictive regulations that apply to the rest of the area between the baseline and the setback line. S.C. Code Ann. § 48-39-290(B) (Supp. 1990). In addition, a definition of "[d]estroyed beyond repair" as meaning "more than sixty-six and two-thirds percent of the replacement value of the habitable structure . . . has been destroyed" was codified. S.C. Code Ann. § 48-39-270(11) (Supp. 1990). Furthermore, the amendment gave the South Carolina Coastal Council authority to issue special permits allowing construction or reconstruction of habitable structures under certain conditions, even if such structures are located seaward of the baseline. S.C. Code Ann § 48-39-290(D) (Supp. 1990).

The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1335 (9th Cir. 1990). As the Supreme Court has recognized, "the government may elect to abandon its intrusion or discontinue regulations," but "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317, 321 (1987). We therefore must consider whether the 1988 Act effected a taking or due process violation during the period that it was in effect.[3]

II.

The fifth amendment, which provides in relevant part that "private property [shall not] be taken for public

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[3] The plaintiffs in both *Esposito* and *Chavous* appear to urge us to consider also their takings and due process claims under the provisions of the 1990 Act. Because these amendments were enacted subsequent to the district court's judgments, there has been no decision by that court upon the question of whether the revised statutory scheme amounts to a taking or violation of due process. These questions, therefore, are not properly before us and we express no opinion upon them.

use without just compensation," applies to the States through the fourteenth amendment. See *Chicago Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). As an initial matter, we note that the courts have traditionally upheld the validity of setback lines and similar land use regulations against constitutional challenges. E.g. *Gorieb v. Fox*, 274 U.S. 603 (1927); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909). The plaintiffs argue, however, that the present case is distinguishable from these prior decisions and we therefore review their claims in light of the more recent Supreme Court takings clause cases.

In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), the Court stated that a land use regulation may constitute a taking if it "does not substantially advance legitimate state interests. . . . or denies an owner economically viable use of his land." The district court in *Esposito* addressed the first prong of that takings test by holding that the State had "an important interest" in protecting its beaches and that the challenged statutes were "substantially related" to furthering this goal. The *Esposito* plaintiffs attack this conclusion, contending that the Act was neither based on a legitimate State interest nor substantially related to any proper State goal.

While the Court may not have elaborated on the standards for determining what constitutes a "legitimate state interest" or what relation between a regulation and the State's interest meets the requirement that one "substantially advance" the other, it has indicated that "a broad range of governmental purposes and regulations" will satisfy these requirements. *Nollan v. California Coastal*

Comm'n, 483 U.S. 825, 834-35 (1987). We are in agreement with the district court that the Assembly's stated purpose to "protect, preserve, restore, and enhance the beach/dune system" constituted a legitimate State interest and exercise of the police power of the State. South Carolina's beach/dune system is a valuable resource that not only protects life and property from the dangers of the ocean, but also provides a source of recreation and tourism-related revenue. The State's interest here was of the same nature as the approved in *Keystone*, 480 U.S. at 488, where the court found that Pennsylvania had acted "to protect the public interest in health, the environment, and the fiscal integrity of the area.[4]

We further believe that the means chosen by the legislature bore a substantial relation to its goal of protecting this valuable resource. While the *Esposito* plaintiffs urge us to hold that the Assembly's policy of withdrawal of building seaward of the setback line is not a viable response to the situation of beachfront erosion we view the matter as one in which "[s]tate legislatures. . . . who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require." *Gorieb v. Fox*, 274 U.S. at 608. The record in this case

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[4] In *Lucas v. South Carolina Coastal Council*, No. 23342, ___ S.C. ___ (February 11, 1991), the South Carolina Supreme Court on a fact situation akin to that of the *Chavous* plaintiffs, held there was no taking of a beachfront plaintiff's property by the enforcement and application of the 1988 Beachfront Management Act involved here. The Court stated, among other things, that it followed the majority opinion in *Keystone*.

indicates that the decision to adopt a strategy of gradually withdrawing unwise development from the beach/dune system was a logical and sufficiently well-founded approach to dealing with beachfront erosion by attempting to restore the natural equilibrium between sand supply, wind, and waves. Having found that the "essential nexus," *Nollan*, 483 U.S. at 837, between the State's interest and its chosen means is present in this case, we will not second-guess the Assembly's decision.

The second prong of the takings analysis requires an inquiry into whether the Act denied the *Esposito* plaintiffs the economically viable use of their property. In *Penn Central Transportation Company v. New York*, 438 U.S. 104, 124 (1978), the Court identified several factors as particularly significant in this inquiry:

> The economic impact of the regulation of the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So too, is the character of the governmental action.

See *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988). The *Esposito* plaintiffs do not contend that the character of the governmental action in this case is the type of physical invasion or appropriation for public use that readily leads to a finding that a taking has occurred. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Rather, they argue that the enactment of the Act

drastically diminished the value of their property.[5] They contend that because their property had significantly less economic market value after passage of the Act, they were effectively deprived of their right and expectations of being able to sell and borrow money against their property.

In response to these contentions, we note that the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's "primary expectation concerning the use of the parcel." *Penn Central*, 438 U.S. at 136. We find that the Act permitted the *Esposito* plaintiffs to

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[5] The district court correctly drew attention to the "distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone*, 480 U.S. at 494; see *Beacon Hill Farm Assocs. v. Loudoun County Supervisors*, 875 F.2d 1081 (4th Cir. 1989). In the present action, it appears that the rebuilding provision of which the plaintiffs complain has not actually been applied to any piece of property. None of the *Esposito* plaintiffs had their homes destroyed beyond repair or were denied permission to rebuild by operation of the statute. Rather, their alleged injuries rest, like those of the plaintiff in *Euclid v. Ambler Realty Co.*, 272 U.S. at 395, "upon the broad ground that the mere existence and threatened enforcement of the [statute], by materially and adversely affecting values and curtailing the opportunities of the market., constitute a present and irreparable injury." In order to succeed on their claim, therefore, the plaintiffs must face the admittedly "uphill battle" of proving that the mere enactment of the Beachfront Management Act so denied them the economically viable use of their property as to constitute a taking. *Keystone*, 480 U.S. at 495.

continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment. The plaintiffs, in fact, have stipulated that "[n]one of the Plaintiffs in the Esposito case have discontinued use of their property, as it was used before enactment of the subject Statutes. . . ." They continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property, and continue to use it for residential and recreational purposes; and they were significantly diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction. Although we are cognizant of the plaintiffs' claim that passage of the Act affected the value of the property and its potential attractiveness on the market, the Supreme Court has observed that neither diminution in property value, *Penn Central*, 438 U.S. at 131, nor "even substantial reduction of the attractiveness of the property to potential purchasers," *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984), will suffice to establish that a taking has occurred. In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the *Esposito* plaintiffs have not established that the regulation in question was "so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (esp. n.17, at 199) (1985).

We also reject the *Esposito* plaintiffs' due process claim. For the statute in question to held in violation of the fourteenth amendment, it must be found "clearly

arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." *Beacon Hill Farm Assocs. v. Loudoun County Supervisors*, 875 F.2d 1081, 1085 n.5 (4th Cir. 1989) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). For the reasons discussed previously, we hold that the 1988 Act was substantially related to South Carolina's legitimate interest in protecting its beaches and therefore reject the plaintiffs' due process claim.

We next turn to the judgment of the district court in *Chavous*. In considering the plaintiffs' takings claim,[6] the district court concluded that the regulations contained in the Act did indeed bear a substantial relation to a legitimate State interest. On the second prong of the test, however, the district court decided that the Act had denied the *Chavous* plaintiffs the economically viable use of their property. The court enjoined further enforcement of the Act against the plaintiffs.

The defendants urge us to reverse the judgment of the district court and hold that the Act did not work a taking of the plaintiffs' property. The plaintiffs, on the other hand, ask that we affirm the judgment with its injunction prohibiting enforcement of the Act against them. We decline to take either course. The injunctive remedy granted by the district court has become pointless because the enjoined statute has been superseded by a significantly amended statutory scheme and is no

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[6] The *Chavous* plaintiffs also advanced a due process claim, but the district court declined to rule upon it after concluding that the plaintiffs were entitled to relief on their takings claim.

longer in effect. See *Tahoe Sierra Preservation Council*, 911 F.2d at 1335-36. The district court, moreover, held that the remedy of damages was barred by the eleventh amendment and the plaintiffs have not challenged this ruling on appeal. We have no jurisdiction over a claim on which no effective relief can be granted. *Mills v. Green*, 159 U.S. 651, 653 (1895). In remarkably similar context, we have only recently held that a changed zoning regulation rendered moot the contest of a prior regulation. *11126 Baltimore Blvd. v. Prince Georges County*, 924 F.2d 557 (4th Cir. 1991). In view of the mootness of the plaintiffs' claim for relief, we express no opinion concerning the correctness of the district court's determination that the 1988 Act effected a taking of the *Chavous* property.

III.

For the reasons discussed above, we affirm the district court's judgment in *Esposito*. In *Chavous*, we vacate the judgment of the district court and remand to the district court with instructions that the case be dismissed as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Accordingly, the district court's judgment in 89-1840 is

AFFIRMED and the district court's judgment in 90-2367 is

VACATED AND REMANDED WITH INSTRUCTIONS.

HALL, Circuit Judge, dissenting:

Let me say, first, that I thoroughly agree with the purposes of the Beachfront Management Act, and second, that my agreement or disagreement with and the wisdom or folly of the Act ought not bear upon whether just compensation should be paid for its effectuation. The Just Compensation Clause is not a miniature variant of substantive due process, ready to slap the government with monetary liability where we believe a regulation is foolish yet not so utterly silly that we should strike it down in its entirety. I hope and expect that the legislative and executive branches will be wise, and that the "public use" for which they take, damage, destroy or diminish private property will be admirable. Nonetheless, the Just Compensation Clause does not apply only to poor governmental choices.

I.

Before going on to our disagreements, I concur in the majority's judgment that the substantive due process claim of the *Esposito* plaintiffs was properly rejected by the district court. I cannot find fault in either the legislative end or means:

II.

It is all too easy in a takings case to become enmeshed in the various tests, factors, and doctrines the Supreme Court has applied through the years. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (three-factor test); *Agins v. Tiburon*, 447 U.S. 255 (1980)

(two-part test); *Hodel v. Indiana*, 452 U.S. 314 (1981) (second *Agins* test only – "no economically viable use"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (per se rule for "permanent physical occupations"). The Court itself has admitted that its inquiry is essentially ad hoc. *Penn Central*, 438 U.S. at 124 (1978). The Court's "tests" are not rigid, unforgiving yardsticks to be slavishly applied notwithstanding a draconian result. On the contrary, the tests are guidelines for resolving the question at the bottom of every case: whether the claimant has been "forc[ed] . . . alone to bear [a] public burden[] which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[1] Who should pay for South Carolina's sudden change in land-use policy? I believe that fairness and justice require the expense to be borne by the public.

We are confronted with the claims of particular persons resulting from the Act's devastating effect on the value of particular property. The plaintiffs do not attack the facial validity of the Act; they challenge it as applied to them. Hence, they need not make the strict showing

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[1] *Armstrong's* admonition lacks the intellectually calming appearance of predictability of a two- or three-factor "test." A legal standard no better defined than "fairness" leaves any judge ill at ease. Nonetheless, one recent commentator, after an exhaustive inventory and analysis of the Supreme Court's takings cases, concluded that the "moral justification" for placing a public burden on a single individual is the real issue on which any given case turns. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 Calif. L. Rev. 1299 (1989) (Part I) and 78 Calif. L. Rev. 53 (1990) (Part II).

required by the "no economically viable use" test. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). The *Keystone* claimants failed to show how the challenged act affected any particular property; the *Esposito* defendants have done so. This case is not a facial challenge, and the "no economically viable use" test should not apply to it. I disagree, therefore, with footnote 5 of the majority opinion.

The factors the Supreme Court most often use in "as applied" takings cases were identified in *Penn Central*, 438 U.S. at 124. They are (i) the character of the governmental action, (ii) the extent of interference with reasonable investment-backed expectations, and (iii) the economic impact on the claimant. Application of these factors illustrates that "fairness and justice" require compensation in these cases.

The first prong of the *Penn Central* test – character of the governmental action – alludes to two potentially dispositive situations. If the government has committed or authorized a permanent physical invasion of private property, compensation is always required. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If the government acts to prohibit a "noxious use" of property, compensation is almost never required. *Mugler v. Kansas*, 123 U.S. 623 (1887). South Carolina is not occupying the claimants' lots, and I reject the notion that a beachfront bungalow is a "noxious use" of property. *See infra* note 2. The character of the governmental action does not, therefore, resolve this case.

The second and third of the *Penn Central* factors weigh heavily in the landowners' favor. Before the 1988

amendments to the Act, the *Esposito* claimants' lots and homes ranged in value from $205,000 to $450,000. The lame duck nature of their use of the property has caused a substantial diminution in value – 35% in the opinion of the Beaufort County assessor. Most of the affected properties are mortgaged. Landowners who had equity that could serve as collateral for other loans have seen their nest egg disappear. Several lending institutions entirely refused to accept the doomed properties as security, notwithstanding that they still have some value. Prospective buyers have been equally hesitant. No affected properties have been sold since the Act amendments, though several have been on the market.

The "investment-backed expectations" of these landowners have been bludgeoned. Were these expectations "reasonable?" Lending institutions thought so. The county thought so, and assessed property taxes accordingly. The state allowed 49% of its coastline to become developed without interfering. Indeed, the state's coffers benefitted from the tax and tourism revenue generated by development of its beaches. I believe that a person could have purchased one of the affected properties with the reasonable expectation that his investment would not be affected by a drastic change in long-term land use policies.

Even under the majority's harsh application of the "no economically viable use" test, the Act would have clearly effected a compensable taking of the *Chavous* landowners' lots. The majority is able to avoid the issue[2]

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[2] The South Carolina Supreme Court addressed a *Chavous*-style case in *Lucas v. South Carolina Coastal Council*, ___ S.E.2d

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by a combination of two fortuities – subsequent amendments to the Act and the district court's unappealed holding that the Eleventh Amendment bars an award of just compensation against a state in a federal court.[3] I

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___ (S.C. 1991). The state court, by a 3-2 margin, upheld the Act under the narrow "noxious use" exception to compensability. I agree entirely with the dissenters in *Lucas*. A noxious use is one that is "tantamount to a public nuisance." *Keystone*, 480 U.S. at 491. Living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified. *Mugler v. Kansas*, 123 U.S. 623 (1887) (distillery); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (downtown livery stable); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (urban brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (red cedar trees infected with apple rust disease near commercial orchards); and *Goldblatt v. Hampstead*, 369 U.S. 590 (1962) (quarrying below water table near town that depended on groundwater supply). The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as "tantamount to a public nuisance." Finally, the Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A "public nuisance" ought to be abated, not phased out through a half-lifetime of attrition.

[3] I agree that this latter holding is not before the court, but I have strong doubts that it was correct. As the majority notes, the Fifth Amendment's Just Compensation Clause was one of the earliest guarantees of the Bill of Rights to be enforced against the states through the Fourteenth Amendment. *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). Inasmuch as the Supreme Court has now held that the Just Compensation Clause always requires *compensation* for any taking, notwithstanding subsequent repeal or invalidation of the offending regulation, *First English Evangelical Lutheran*

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agree with the majority that a remand is necessary. However, I would not create a sweeping rule that a state whose statute has been enjoined may moot the injunction by tinkering with the statute. The recent amendments to the Act may or may not rectify its previous constitutional defects. At oral argument, the landowners made it clear that they still challenge the constitutionality of the Act, even as amended; there is plainly still a case or controversy, and I would not force the landowners to file a new suit. I would remand to permit the Coastal Council to move to dissolve the injunction.

III.

Legislatures and administrators undoubtedly often face the choice between purchasing a property right or regulating it away. In these days of deficits, it must be tempting to choose the costless regulatory route. Perhaps the Framers would have ensured more efficient government by permitting thievery of private property for public uses. However, they sacrificed the expedience of this approach in favor of a system that requires a proposed public use be one for which the public is willing to foot the bill. As Justice Holmes put it,

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Church v. Los Angeles County, 482 U.S. 304, 317 (1987), the Eleventh Amendment's general bar of damages against states must yield. Otherwise, a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.

> a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the damage.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

South Carolina now admits that its longstanding land use policies were ill-advised. Good government occasionally requires such admissions; history is a lesson, not a straightjacket. However, a governmental error is a collective error, and the burden of rectifying it should be borne by all, not just by those who unfortunately, but reasonably, relied on it.

Except as stated elsewhere in this opinion, I respectfully dissent.